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EDITOR'S NOTE

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No. 84-1726-CFX
Status: GRANTED

Docketed:
May 13, 1985

Title: East River Steamship Corp., et al., Petitioners
v.
Transamerica Delaval Inc.

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Fisher Jr.,Clarkson S., Durkin Jr.,Thomas E.

Counsel for respondent: Smith,Robert E.

Entry	Date	Note	Proceedings and Orders
1	May 13 1985	G	Petition for writ of certiorari filed.
2	Jun 13 1985		Brief of respondent Transamerica Delaval Inc. in opposition filed.
3	Jun 18 1985		DISTRIBUTED. September 30, 1985
4	Oct 7 1985		Petition GRANTED.
			**********
5	Nov 4 1985		Record filed.
6	Nov 4 1985		Certified copy of appendix and partial C. A. proceedings received.
7	Nov 4 1985		Record filed.
8	Nov 4 1985		Certified copy of appendix & partial C. A. proceedings received.
9	Nov 9 1985		Record filed.
10	Nov 21 1985		Joint appendix filed.
11	Nov 21 1985		SET FOR ARGUMENT, Tuesday, January 21, 1986. (4th case).
12	Nov 21 1985		Brief of petitioner East River Steamship Corp. filed.
13	Dec 9 1985		CIRCULATED.
14	Dec 23 1985	X	Brief of respondent Transamerica Delaval Inc. filed.
15	Dec 20 1985	G	Motion of Pott Industries Inc. for leave to file a brief as amicus curiae filed.
16	Dec 20 1985	G	Motion of Product Liability Advisory Council, Inc., et al. for leave to file a brief as amici curiae filed.
17	Dec 26 1985	D	Motion of Ingram River Equipment, Inc. for leave to file a brief as amicus curiae filed.
18	Jan 8 1986	X	Reply brief of petitioners East River Steamship Corp., et al. filed.
19	Jan 13 1986		Motion of Pott Industries Inc. for leave to file a brief as amicus curiae GRANTED.
20	Jan 13 1986		Motion of Product Liability Advisory Council, Inc., et al. for leave to file a brief as amici curiae GRANTED.
21	Jan 13 1986		Motion of Ingram River Equipment, Inc. for leave to file a brief as amicus curiae DENIED.
22	Jan 21 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No. 84-1726

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EAST RIVER STEAMSHIP CORP., KINGSWAY TANKERS, INC., QUEENSWAY TANKERS, INC., and RICHMOND TANKERS, INC.,

Petitioners,

vs.

TRANSAMERICA DELAVAL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Should this Court resolve the clear and substantial conflict that exists among the circuits as to whether repair costs and damages incurred due to the loss of the use of a vessel, proximately caused by a defective product, may be recovered absent proof that the product caused "an unreasonable risk of harm,"

(a) in an admiralty strict liability in tort action? and

(b) in a negligence action falling within the court's admiralty jurisdiction?

2. Does not the rule adopted by the court below, in clear contradiction of the decisions of this Court, and other courts of appeals, encourage negligent and reckless conduct on the part of manufacturers and designers of vessels and vessel components? Due to the public importance involved, should not this Court take the first step in correcting the erroneous result below by granting the writ requested?

PARTIES BELOW

Petitioners East River Steamship Corp. ("East River"), a New York corporation, Kingsway Tankers, Inc. ("Kingsway"), a New York corporation, Queensway Tankers, Inc. ("Queensway"), a Delaware corporation, and Richmond Tankers, Inc. ("Richmond"), a Delaware corporation, are the bareboat charterers of the T.T. BROOKLYN, T.T. WILLIAMSBURGH, T.T. STUYVESANT and T.T. BAY RIDGE, respectively. Petitioners have their principal places of business in Fort Lee, New Jersey. Wilmington Trust Co., as Trustee for General Electric Credit Corporation ("GECC") is the owner of the WILLIAMSBURGH and the BROOKLYN. U.S.

Trust Company as Trustee for GECC is the owner of the STUYVESANT. U.S. Trust Company as Trustee for Security Pacific Bank and American Road Equipment Corporation is the owner of the BAY RIDGE. Seatrain Lines, Inc., a Delaware corporation, guaranteed the petitioners' performances of the charter parties.

Respondent Transamerica Delaval, Inc. ("Delaval"), formerly known as Delaval Turbine, Inc., is a Delaware corporation with its principal place of business in Trenton, New Jersey.

Pursuant to U.S. Sup. Ct. R. 28.1, petitioners advise that they have no parent companies, subsidiaries or affiliates.

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IN THE

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OCTOBER TERM, 1984

EAST RIVER STEAMSHIP CORP., KINGSWAY TANKERS, INC., QUEENSWAY TANKERS, INC., and RICHMOND TANKERS, INC.,

Petitioners,

vs.

TRANSAMERICA DELAVAL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners East River Steamship Corp., Kingsway Tankers, Inc., Queensway Tankers, Inc., and Richmond Tankers, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 16, 1985.

OPINION BELOW

The opinion of the Court of Appeals, sitting *in banc*, reported at 752 F.2d 903, appears in the Appendix hereto. The opinion of the United States District Court for the District of New Jersey was not reported but appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, sitting *in banc*, was entered on January 16, 1985, and a timely petition for rehearing was denied on February 13, 1985. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This action sets forth claims within federal maritime and admiralty jurisdiction. 28 U.S.C. §1333. It involves the claims of the bareboat charterers of four 225,000 ton supertankers against Delaval, the manufacturer and designer of turbine units for the four ships. Delaval also supervised the installation of the turbines into the vessels during their construction in Brooklyn, New York.

Alleging Delaval's liability under theories of strict liability in tort (as to each of the four vessels) and negligence (as to Richmond's claim for the 1980 incident involving the BAY RIDGE), the petitioners sought compensatory damages, for the repair costs and loss of income due to the unavailability of the vessels during repairs, in the approximate amount of $7,000,000.

The district court originally granted summary judgment dismissing the four counts alleging strict liability in tort and leaving intact the BAY RIDGE negligence count (App. 71a). Subsequently, upon reconsideration, the district court also granted summary judgment dismissing the BAY RIDGE negligence count (App. 82a). After a panel of the Court of Appeals for the Third Circuit heard argument on November 17, 1983, the court ordered that the matter be scheduled for rehearing (App. 32a). On November 13, 1984, the court of appeals, *in banc*, heard argument and, on January 16, 1985, the judgment of the district court was affirmed (App. 34a). The court below determined that the damage caused to the charterers of the four vessels was not compensable under any of the tort theories alleged.

A. *The STUYVESANT*

The STUYVESANT sailed on her first voyage at the end of July, 1977. On December 11, 1977, while the STUYVESANT was preparing to enter the Port of Valdez, Alaska, a loud noise was heard emanating from, and superheated steam was detected leaking from, the high pressure turbine. At that point, no one could determine the source of the problem.

After berthing at Valdez on December 11, all the bolts around the area where the superheated steam was escaping were tightened and secured. The STUYVESANT departed Valdez on December 13, 1977. Shortly after departure, major problems occurred concerning the operation and maneuverability of the STUYVESANT, placing the safety of the vessel and her crew in jeopardy. During this time, the vessel found herself in a major storm with her turbine not functioning at vibrating speed. Because of this lack of power and the mountainous seas (estimated to be at least 65 feet), the vessel found

herself drifting, quite rapidly, toward the shore of the Gulf of Alaska. On Christmas Day, 1977, as the STUYVESANT attempted to continue her voyage, arrangements were made for certain personnel knowledgeable in the operations of the turbine to be helicoptered onboard the STUYVESANT, including a representative of Delaval.

The voyage was completed without injury to the crew, but it was later determined, when the STUYVESANT was berthed at the Triple A Shipyard in San Francisco, that the first stage steam reversing ring had, in fact, "disintegrated" and damaged other parts of the turbine.

Prior to the arrival of the STUYVESANT on January 27, 1978 at the shipyard in San Francisco, various possible causes of the damage were reviewed, and as a result, a first stage steam reversing ring was taken from the BAY RIDGE (which was still under construction), transported to San Francisco, and installed in the STUYVESANT. Since the BAY RIDGE had not been operational even for a sea trial, the ring which was taken from the BAY RIDGE was a new ring.

The STUYVESANT departed San Francisco on February 2, 1978 after the interim repairs were made.[1] On April 8, 1978, the STUYVESANT re-entered the Triple A Shipyard in San Francisco, and the highpowered turbine was again opened and inspected. A determination was made that the first stage steam reversing ring that had been taken from the BAY RIDGE was damaged

1. The intent of the parties at the time the repairs were made on the STUYVESANT in San Francisco was that those repairs were only temporary measures. All parties felt that the ring involved was, in fact, defective and/or improperly manufactured. The ring was subsequently redesigned and later installed in each of the four vessels in question.

even though it was only in place for eight to nine weeks. That ring was removed and a ring which had previously been installed in the BROOKLYN was removed and taken to San Francisco. There, it was reinforced and modified in accordance with the instructions and under the supervision of Delaval personnel. Again, interim repairs were made and the STUYVESANT departed the shipyard on April 11, 1978, remaining operational until August 13, 1978. At that time another inspection of the turbine was made, the "BROOKLYN ring" was removed and a newly designed and manufactured ring, materially different from the original, was installed by Delaval.

B. *The BROOKLYN and the WILLIAMSBURGH*

During the time that the STUYVESANT was experiencing difficulties with the first stage steam reversing ring, inspections were made on the highpowered turbines in the BROOKLYN and the WILLIAMSBURGH. These inspections revealed that the rings installed in those vessels were disintegrating and that in all probability, but for these inspections, the BROOKLYN and WILLIAMSBURGH would have encountered experiences similar to the STUYVESANT.

C. *The BAY RIDGE*

On March 13, 1980, while at sea, the BAY RIDGE's low pressure turbine sustained damage necessitating a reduction in speed and repairs at the nearest port of refuge. Particularly, it was demonstrated (at least Delaval did not take issue with this in successfully moving for summary judgment) that Delaval failed to supervise properly the installation of the astern guardian valve in the BAY RIDGE. As a result, steam which was not intended to enter into the low pressure turbine was caused to come into contact with that turbine, causing damage

in March of 1980, while the BAY RIDGE was off the coast of South America en route to Valdez.

D. *Summary*

Each of the petitioners was damaged, in varying amounts, as a result of the "disintegrating" ring designed and manufactured by Delaval. Petitioner Richmond was also damaged by Delaval's negligent supervision of the installation of the BAY RIDGE's low pressure astern guardian valve. These damages, which consisted of the costs of repair as well as the loss of the use of the vessels during repairs, were approximated at $7,000,000.

Despite overwhelming authority directly to the contrary, the court of appeals below affirmed the district court's summary dismissal of petitioners' action. That judgment was based solely on the determination of the court that neither Delaval's defective first stage steam reversing ring nor Delaval's negligent supervision of the installation of the BAY RIDGE's low pressure astern guardian valve created "an unreasonable risk of harm," an element which the court deemed necessary for recovery against Delaval. Yet four other courts of appeals, *see* n. 5, *infra*, have allowed recovery on a strict liability theory regardless of the presence or absence of "an unreasonable risk of harm." Four other courts of appeals, *see* n. 24, *infra*, permit such recovery of these damages in an admiralty negligence action, also in the absence of "an unreasonable risk of harm."

The conflict among the circuits created by the decision below, has left a significant legal issue of admiralty law unsettled. As a result, the substantial efforts by this Court to have uniform standards apply in such matters have been frustrated. The lack of uniformity, which will

continue to exist if certiorari is denied, invites forum shopping; cases will be decided not on the merits but on venue. To counter this result and to re-establish uniformity in admiralty it is respectfully urged that this Court grant certiorari to review the decision below.

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court of Appeals Below Creates a Conflict Among the Circuits as to What Damages Are Compensable in Admiralty Strict Liability in Tort and Negligence Actions

This case presents issues of great importance to which there is presently a clear conflict among the courts of appeals which have considered it. The issues raised herein require, we respectfully urge, this Court to issue a writ of certiorari to ensure uniformity in the application of admiralty law by resolving the current conflict among the circuits.

A. *Admiralty Law Is Intended to Apply Uniformly Throughout the Nation*

It is a "constitutionally based principle" that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." *The LOTTAWANNA*, 88 U.S. (21 Wall.) 558, 575 (1875); *Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970).[2] It is intolerable to this uniform system of law for it to be burdened with the substantial inconsistency which has resulted from the decision below. Issuance of a writ of certiorari to the court of appeals below is necessary to "assure uniform vindication of . . . exclusive maritime substantive concepts." *Moragne, supra*, 398 U.S. at 401.

2. *See also, Petition of M/V ELAINE JONES*, 480 F.2d 11, 31 (5th Cir. 1973), cert. denied 423 U.S. 840 (1975) which determined that uniformity is "mandated" by *Moragne*.

B. *The Writ Should Issue When a Clear Conflict Among the Circuits as to a Substantial Issue Is Presented*

The prime purpose of the Court's certiorari jurisdiction is to resolve disagreements between courts of appeals. *U.S. Sup. Ct. R.* 17.1(a); *see, e.g., Bailey v. Weinberger*, 419 U.S. 953 (1974) (White, J., dissenting).[3] Petitioners are mindful that disagreements which are "academic" or "episodic" do not normally give rise to the issuance of the writ. *Rice v. Sioux City Cemetary*, 349 U.S. 70, 74 (1954) (". . . this Court does not sit to satisfy a scholarly interest in such issues"). However, a dispute between courts of appeals which is significant and recurring requires resolution by this Court:

> Whether or not the Court agrees with the result reached below, the conflicts are square; they are on issues which arise with frequency in the lower federal courts; and they are on significant questions of law.

Greco v. Orange Memorial Hospital Corporation, 423 U.S. 1000, 1006 (1975) (White, J., dissenting). The denial of certiorari under such circumstances undesirably causes the application and enforcement of federal law in one area of the country differently from that in another area. Again, see, for example, Justice White's dissents in *Masri v. United States*, 434 U.S. 907, 908 (1977) (joined by Justice Marshall), *Scott v. Williams*, 434 U.S. 910 (1977) (joined by Justice Brennan), and *Greco, supra* (joined by Chief Justice Burger).[4] The need for the issu-

3. Much of what has been said by this Court as to the availability of certiorari appears to be contained in opinions dissenting from the denial of certiorari. Thus, it should not be surprising that most of the authorities cited in this portion of the petition are to dissenting opinions.

4. It is a curious, but inherent, aspect of this Court's certiorari jurisdiction, that while the Court denied certiorari in *Masri, Scott*

ance of the writ increases when the hallmark of the area of law in question is national uniformity. *See* Point IA, *supra*. Thus, this Court in the past has been quick to issue the writ in admiralty actions, not only when the disagreement is between courts of appeals, but also when the disagreement is between a court of appeal and a state court of last resort, *see, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 733 (1961); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), between a court of appeals and the Court of Claims, *Waterman S.S. Corp. v. United States*, 381 U.S. 252, 258 (1965), and between a court of appeals and the Queen's Bench in England, *Aetna Ins. Co. v. United Fruit Co.*, 304 U.S. 430, 434 (1938). As stated by Justice Gray in *The J.E. RUMBELL*, 148 U.S. 1, 17 (1892), in cases arising within the federal courts' admiralty and maritime jurisdiction, "neither the decisions of the highest court of a state, nor those of the circuit and district courts of the United States, can relieve this court from the duty of exercising its own judgment."

In short, it has been this Court's function, in the absence of controlling Acts of Congress, to "fashion[ ] a large part of the existing rules that govern admiralty." *Wilburn Boat*, 348 U.S. at 314. Certainly, in an appropriate situation, an admiralty rule may be fashioned by this Court's denial of certiorari, which would let a court of appeals decision remain intact. However, since the

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and *Williams, supra*, despite clear conflicts, it has granted certiorari when there has been exhibited only "an apparent conflict," *Avco Corp. v. Aero Lodge, I.A.M. & A.W.*, 390 U.S. 557, 559 (1968), or merely "an apparent conflict in approach," *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846 (1974). *See also, Waldron v. Moore-McCormack Lines*, 386 U.S. 724, 724 n. 2 (1967) (emphasis added), an admiralty action where the Court granted certiorari because cases from other courts of appeals "*seem[ed] to suggest* a result different from the one reached in the instant case."

denial of certiorari does not impart a decision on the merits, *see Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n. 1 (1973); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950), decision-making through the denial of certiorari can only have utility *in the absence of a conflict in the courts of appeals.*

C. *The Undesirable Effects of the Denial of Certiorari When a Clear Conflict Is Presented*

Here, as to the strict liability in tort issues, there is an indisputable conflict between the Court of Appeals for the Third Circuit, on one hand, and the Courts of Appeals for the Fifth, Eighth, Ninth and Eleventh Circuits, on the other. A denial of certiorari would leave the conflict unresolved, with the following undesirable effects:

(1) recovery in like cases will be permitted within the Fifth, Eighth, Ninth and Eleventh Circuits,[5]

(2) recovery will be denied in the Third Circuit,[6] and

(3) no one can presently predict whether there will be recovery of such damages in the remaining Circuits or state courts.

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5. *Jig The Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), cert. denied 424 U.S. 954 (1976); *Ingram River Equipment, Inc. v. Pott Industries, Inc.*, 756 F.2d 649 (8th Cir. 1985); *Emerson G.M. Diesel, Inc. v. Alaskan Enterprise*, 732 F.2d 1468 (9th Cir. 1984); *Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984). See also *Berg v. General Motors Corp.*, 87 Wash. 2d 584, 555 P.2d 818, 1977 A.M.C. 58 (1976); *Laurentine, Inc. v. General Motors Corp.*, 1980 A.M.C. 715 (S.D.Ala. 1978).

6. *East River S.S. v. Delaval Turbine*, 752 F.2d 903 (3d Cir. 1985); *see also, Maru Shipping Co., Inc. v. Burmeister & Wain American Corp.*, 528 F.Supp. 210 (S.D.N.Y. 1981).

As to the negligence counts, the decision below is contrary to the decisions of the Second, Fifth, Sixth and Eighth Circuits,[7] giving rise to similar detrimental results. Since the issues presented concern substantial,[8] and recurring[9] problems in a field of law which requires uniformity, the only avenue for resolution is by the granting of certiorari.

D. *The Severe Conflicts Among the Circuits*

The decision below has created a conflict among the circuits on two related, but distinct, issues. First, the decision below is clearly contrary to the reasoned decisions of four other courts of appeals[10] as to whether damages for the repair of a vessel and for loss of the use of a vessel during repairs may be obtained in an admiralty *strict liability in tort* action. Second, the decision below disagrees with various other courts of appeals as to whether those same damages may be obtained in an admiralty *negligence* action. The decision below denies recovery, under either theory, unless an injury to person or property has occurred. The other courts of appeals which have dealt with these issues, however, permit re-

7. *See* n. 24, *infra*.

8. Noteworthy is the fact that the decision below was entered by the court of appeals, *in banc*, which was convened on the court's own motion (App. 32a) a step that court reserves only for "exceptionally important" questions. *U.S. Ct. App. 3d Cir.*, Rule 22; Third Circuit Internal Operating Procedures, VIII B; *U.S. Steel Corp. v. United Mine Workers of America*, 534 F.2d 1063, 1084 (3d Cir. 1976).

9. The fact that *four* courts of appeals have dealt with the strict liability in tort issue within the past year, *see, e.g., Ingram River, Emerson G.M.*, and *Miller Industries*, *supra* n. 5 and *East River*, *supra* n. 6, conclusively demonstrates that the issues presented are certainly not episodic.

10. *See* n. 5, *supra*.

covery under either a negligence or strict liability in tort theory regardless of actual or potential injury.[11]

We request that the Court issue a writ of certiorari and resolve both these conflicts.

1. *The Conflict Concerning the Damages Available in an Admiralty Strict Liability in Tort Action*

Since this case was decided by the court below, the Court of Appeals for the Eighth Circuit, faced with the same issue, reviewed the decision below, and the other contrary authorities, and determined:

> The Third Circuit has thus created a conflict with the Fifth, Ninth and Eleventh Circuits . . . .

756 F.2d at 653. See also Judge Becker's dissent below. 752 F.2d at 915 n. 5.

The decision below, in a nutshell, concluded that the petitioners could not recover the costs of repair and the damage incurred due to the loss of the use of the vessels because the defective product posed no "unreasonable risk of harm to persons or property other than the product itself . . . ." 752 F.2d at 904. However, the court went on to limit the phrase "unreasonable risk" by holding "that *because no persons or property were injured or damaged*, no tort recovery was appropriate in this case given the qualitative nature of the defect and the gradual manner in which the defect manifested it-

11. The first four counts of the second amended complaint allege strict liability in tort, on behalf of each of the four vessels, due to Delaval's design and manufacture of the high pressure turbine's first stage steam reversing ring, which disintegrated, causing loss of power and maneuverability, despite little use. The fifth count sets forth petitioner Richmond's negligence claim due to Delaval's negligent supervision of the installation of the BAY RIDGE's low pressure astern guardian valve.

self." 752 F.2d at 910.[12] The contradiction in terms between the purported requirement of "unreasonable *risk* of harm," 752 F.2d at 904 (emphasis added), later described by the majority below as requiring that persons or property, in fact, be *injured* by the defect, 752 F.2d at 910, can only serve to confuse, rather than guide, the next district court faced with the issue.

In dissent, Judge Becker examined the lack of guidance which is caused by the majority's refusal to permit recovery of "economic loss"[13] in a "near miss" case. The

12. Noteworthy is the fact that it was the district court's entry of *summary* judgment which was affirmed by the court of appeals below. We fail to see how summary judgment, on questions concerning the qualitative or quantitative nature of the defect, whether the defect manifested itself in a gradual manner or whether there was presented "an unreasonable risk," can ever be available, particularly in light of the STUYVESANT's experiences off the coast of Alaska on her maiden voyage. On December 11, 1977, a loud noise was heard emanating from, and superheated steam was detected as leaking from the STUYVESANT's high pressure turbine. That same day, the bolts in the area of the steam leak were tightened. Two days later, after her departure from Valdez, the STUYVESANT encountered major problems relative to her operation and maneuverability while proceeding through a major storm (with mountainous seas estimated to be at least 65 feet). Due to the loss of maneuverability, and proceeding at less than vibrating speed, the STUYVESANT found herself drifting, quite rapidly, toward the shore of the Gulf of Alaska.

Assuming the court below articulated a correct doctrine of law, by its very terms the allegations concerning the STUYVESANT do not lend themselves to summary judgment. (Of course, the purpose of this petition, and the writ sought, is not to correct an improvidently granted summary judgment *per se*, but to settle the substantial issues of admiralty law presented.)

13. In *Emerson G.M.*, the Ninth Circuit demonstrated how the use of the phrase "economic loss" is also both misleading and inaccurate:

> [The majority land-based rule] seems to regard economic loss as inherently different from property damage or personal injury and therefore not properly redressed by tort liability. We disagree. *Economic loss is no different from personal injury or property damage in the sense it is also a loss that is proximately caused by the defendant's conduct.* Here the appellants were not only deprived of the value of a merchantable reduction gear unit but also of their livelihood—several weeks' profits during the height of the king-crab season.

732 F.2d at 1474(emphasis added).

14. For example, if the STUYVESANT had struck another vessel due to the loss of power and maneuverability caused by the disintegrating ring, yet the sole additional damage consisted of the inconsequential removal of paint from her hull, the repair costs and loss of use damages would be recoverable. But can anyone say the risk of harm is not identical if the STUYVESANT narrowly missed the other vessel?

15. For example, if the steam escaping from the STUYVESANT's turbine had burned a seaman's arm, no matter how minor the injury, under the view of the court below, the charterer would have been able to obtain the damages sought herein. In the absence of that minor burn, according to the decision below, petitioners are remediless. Yet the injured seaman would have no interest in the petitioners' recovery, and vice versa; and the recovery of one's damages has no logical relation to the other's.

majority, as Judge Becker noted, by requiring proof of an actual injury, took the word "risk" out of its own definition. By so holding, the majority's opinion bars recovery even in a "near miss" case, thus creating a doctrine which can only lead to arbitrary results.[14] However, even the adoption of "an unreasonable risk of harm" test applied so as to truly consider the nature of the risk involved, requires an element of proof essentially unrelated to the damage incurred.[15]

All other courts of appeals which have considered the issue have followed earlier precedents of this Court, and have rejected the need to demonstrate either an injury, *in fact*, or a *risk* of injury to person or property. Thus, the decision of the court below has created a schism on these issues.

This Court has consistently recognized that admiralty has developed, despite the content of land-based law, its own fair and simplistic rules. See, e.g., *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953); *Kermarec v. Transatlantique*, 358 U.S. 625, 631 (1959).[16] It is a source of both comfort and wonder that this Court's 160 year old decision in *The APOLLON*, 22 U.S. (9 Wheat.) 362 (1824) remains a clear statement for rejecting the arbitrary distinction between tort and contract (a distinction exalted by the court below) and its irrational effect on the recovery of damages of this nature. As Justice Story stated in *The APOLLON*:

> But it is now said, that demurrage always arises *ex contractu*, and, therefore, cannot furnish any rule of compensation in cases of tort. The practice in courts of admiralty has certainly been otherwise; and the very cases cited at the bar show that no distinction has been taken as to its application, between cases of contract and cases of tort. In truth, demurrage is merely an allowance or compensation for the delay or detention of a vessel. It is often a matter of contract, but not necessarily so. The very circumstance that in ordinary commercial voyages, a particular sum is deemed by the parties a fair compensation for delays, is the very reason why it is, and ought to be, adopted as a measure of compensation, in cases *ex delicto*.

16. In *Kermarec*, this Court refused to apply the common law standards owed by a landowner to those who come upon his land to vessel owners. Declining to determine the content of the majority land-based doctrine as being "unnecessary," the Court adopted a rule consistent with admiralty's "tradition of simplicity and practicality." While the district court felt bound by the majority land-based rule (App. 62a) and, to a degree, so did the court below, *Kermarec* clearly demonstrates the error in such an approach.

22 U.S. at 377-378. Again, before the turn of the century, this Court held "[t]hat the loss of profits or of the use of a vessel pending repairs, or other detention, arising from a collision, *or other maritime tort*, and commonly spoke of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question." *The CONQUEROR*, 166 U.S. 110, 125 (1897) (emphasis added).

It is this approach which has led the Courts of Appeals for the Fifth,[17] Eighth,[18] Ninth[19] and Eleventh[20] as well as the Supreme Court of Washington,[21] and several district courts,[22] to conclude that "[r]equiring recovery for economic loss to depend on the presence of personal injury or property damage is an arbitrary distinction leading to opposite results in cases that are virtually the same." *Emerson G.M., supra*, 732 F.2d at 1474. Accordingly, these courts have permitted recovery of so-called "economic loss" despite the complete absence of even a risk of injury. *Id* at 1474; *Miller Industries, supra*, 733 F.2d at 816-818; *Jig The Third, supra*, 519 F.2d at 175-176; *Ingram River, supra*, 756 F.2d at 653. The decision of the court below clearly conflicts with the decisions reached by these courts.

17. *Jig The Third, supra* at n. 5.
18. *Ingram River, supra* at n. 5.
19. *Emerson G.M., supra* at n. 5.
20. *Miller Industries, supra* at n. 5.
21. *Berg, supra* at n. 5.
22. *Laurentine, supra* at n. 5; *Miller Industries Inc. v. Caterpillar Tractor Co.*, 473 F.Supp. 1147 (S.D.Ala. 1979) vacated on other grounds 516 F.Supp. 84 (S.D.Ala. 1980); *Vessel Management, Inc. v. Caterpillar Tractor Co.*, Civil Action No. 80-110-NN (E.D. Va. 1982), remanded on other grounds Docket No. 82-1160, 1161 (4th Cir. 1982); *Prudential Lines, Inc. v. Avondale*, 1984 A.M.C. 2036 (S.D.N.Y. 1983). *See also* Edelman, "An Overview of Products Liability in a Marine Context," 5 *The Maritime Lawyer* 159, 165 (1980).

Although the majority below did not refer to either *Emerson G.M.* or *Miller Industries*, in dissent, Judge Becker noted that the majority's opinion was directly at odds with those decisions. 752 F.2d at 915 n. 5. Less than two months after the entry of the judgment of the court below, the Court of Appeals for the Eighth Circuit dealt with the same issue and concluded that due to the decision below, "[t]he Third Circuit has thus created a conflict with the Fifth, Ninth and Eleventh Circuits . . . ." *Ingram River, supra*, 756 F.2d at 653. The Eighth Circuit followed the lead of the Fifth, Ninth and Eleventh Circuits, holding: "[t]he contrary rule, that the loss should be borne by the innocent purchaser, is unjust, in our opinion." 756 F.2d at 653.

Since the decision below clearly conflicts with four other circuits, as well as some district courts and a state court of last resort, this Court, it is respectfully urged, should grant the writ to resolve this conflict.

2. *The Conflict Concerning The Damages Available In An Admiralty Negligence Action*

Petitioner Richmond, as bareboat charterer (and thus, owner *pro hac vice*) of the BAY RIDGE sought damages to redress Delaval's negligent supervision of the installation of the low pressure astern guardian valve. Richmond alleged in the fifth count of the second amended complaint that Delaval's negligence caused this valve to be installed in reverse. This reverse installation caused stream to enter the low pressure turbine which caused heating, stretching and breaking of the last row blading of the turbine. This damage was experienced by the BAY RIDGE, in March, 1980, while she was off the east coast of South America en route, via Cape Horn, to Alaska.

In successfully moving for summary judgment in the district court, Delaval's sole supporting affidavit (executed by its counsel) did not take issue with these facts but rather claimed that the events concerning the BAY RIDGE did not create a danger to ship or crew, as a matter of law. The district court originally denied the motion on this fifth count of the second amended complaint (App. 71a), but subsequently reconsidered (App. 73a) and entered summary judgment (App. 82a). The court of appeals affirmed, determining, as urged by Delaval, that the element of "an unreasonable risk of harm" is required as a predicate to the recovery of damages even when the theory alleged is negligence:

> Our reasoning in this case is equally applicable to products liability cases brought in negligence and those brought in strict liability, and this is applicable to all five counts of the second amended complaint. One of the cases we rely on in the text, *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), involved negligence as well as strict liability claims, and the court in that case did not distinguish between the two theories in applying the rule against recovery of damages where an unreasonable risk of harm is not present.

752 F.2d at 908 n.2. While it is odd that the majority should so conclude after apparently determining otherwise at another point in their opinion,[23] it is more curious that reliance would be placed on *Seely v. White Motor Co.*, 63 Cal.2d. 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

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23. "It is true that recovery for the value of the use of a ship for the time it is put out of use by tortious conduct is traditionally an element of damages *in a tort suit*. This element of damages is known as "demurrage". In these cases, the traditional tort policy of full compensation is enforced in admiralty, as it is on land." 752 F.2d at 907 (emphasis added).

The Supreme Court of California has repudiated the *Seely* decision in *J'Aire Corp. v. Gregory*, 24 Cal.2d 799, 157 Cal. Rptr. 407, 598 P.2d 60 (1970), determining that so-called "economic loss" may be recovered in an action based on the negligence of the product manufacturer. *See also*, *Pisano v. American Leasing*, 146 Cal.App.3d 194, 194 Cal. Rptr. 77 (1983); *Huang v. Garner*, 157 Cal.App.3d 404, 203 Cal. Rptr. 800 (1984); and the discussion of these California cases in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 128-129 (N.D. Cal. 1984).

Thus, despite the irrelevancy of the content of California law to the issues faced by the court below, even that slim reed does not support the decision below.

Moreover, the imposition of a requirement of "an unreasonable risk of harm" in a negligence action by the court below, again, creates a conflict among the circuits. The Second, Fifth, Sixth, and Eighth Circuits[24] have determined that damages such as those sought by petitioners are available in a negligence action regardless of the presence of a risk of harm.[25]

The Third Circuit's conflict with the other circuits and this Court's early opinions in *The APOLLON*, *supra* at 16 and *The CONQUEROR*, *supra* at 17, must be resolved through the issuance of a writ of certiorari.

24. The Second: *Compania Pelineon De Nevegacion v. Texas Pet. Co.*, 540 F.2d 53, 55 (2d Cir. 1976), cert. denied 429 U.S. 1041 (1977); the Fifth: *Jig The Third*, *supra* at n. 5, 519 F.2d at 175; *Alcoa Steamship Co. v. Charles Ferran & Co.*, 383 F.2d 46, 50 (5th Cir. 1967), cert. denied 393 U.S. 836 (1968); *Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401, 412 (5th Cir. 1982), cert. denied 459 U.S. 1036 (1982); the Sixth: *National Steel Corp. v. Great Lakes Towing Co.*, 574 F.2d 339, 345 (6th Cir. 1978); the Eighth: *Ingram River*, *supra* at n. 5.

25. Noteworthy is the decision of Judge Werker in *Avondale*, *supra* at n. 22, wherein an allegation of "negligent design and manufacture" was sufficient to state a claim upon which damages, like those sought herein, could be recovered. 1984 A.M.C. at 2038-2039.

II

This Case Presents Highly Significant Issues as to the Recovery of Damages in Admiralty Actions and Requires the Granting of the Writ Regardless of the Obvious Conflict Among the Circuits

Regardless of the obvious conflict created by the court below, the issues presented herein are so significant to the public that, we respectfully urge, the writ should be granted so that this Court may provide guidance to the lower courts on these critical problems. *See*, *e.g.*, *Executive Jet Aviation v. Cleveland*, 409 U.S. 249, 252 (1972) (emphasis added) wherein the Court noted the availability of certiorari to "consider a *seemingly* important question" affecting the scope of admiralty jurisdiction; the issues presented herein are, in our view, more than "seemingly important."

Here, while the conflict created by the decision below is obvious and irreconcilable, the issues presented are so important that certiorari is appropriate regardless of the conflict.

The decision of the Court of Appeals for the Third Circuit, if permitted to stand, has the effect of condoning and perhaps, even encouraging carelessness on the part of those who manufacture and design vessels and vessel components. No court which has dealt with this issue disputes that the concept of "strict liability in tort" exists in admiralty. The intent of that theory of liability is to place the burden of loss on the creator of a product placed in commerce so as to encourage the production of safer and more useful products. To fulfill that intent unnecessary and arbitrary restrictions should not be appended to that doctrine of law.

The products in question herein are the turbines which propel the mammoth vessels chartered by the petitioners. These vessels were intended and were in fact used for the carrying of large amounts of oil considerable distances around the globe. Catastrophes involving such vessels, and such as was faced, but fortunately not realized, by the STUYVESANT are rarely minor. An oil "spill" from such a vessel can have devastating effects on the vessel and crew and can permanently damage the environment. *See, e.g., In re Oil Spill by "AMOCO CADIZ,"* 471 F.Supp. 473 (Jud. Pan. Mult. Lit. 1979).

While such a disaster did not take place herein, the rule of law announced by the court below places the burden of loss on the victims of a product manufacturer's negligence. In so doing, it removes an impetus to manufacturers to create safer and better products in an industry where failure to do so could produce grave injury to ship and crew. More importantly, however, in this area, a manufacturer's failure to produce a safe and efficient product can have monumental effects on the environment.

We respectfully urge that certiorari be granted so that this Court may review these exceptionally important matters.

CONCLUSION

For these reasons, it is respectfully requested that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: May 13, 1985

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD COURT

No. 83-5192

EAST RIVER STEAMSHIP CORP.,
A NEW YORK CORPORATION;
KINGSWAY TANKERS, INC.,
A NEW YORK CORPORATION;
QUEENSWAY TANKERS, INC.,
A DELAWARE CORPORATION;
RICHMOND TANKERS, INC.,
A DELAWARE CORPORATION

Appellants

vs.

DELAVAL TURBINE, INC., now known as
TRANSAMERICA DELAVAL INC., A DELAWARE
CORPORATION

Appellees

Appeal From the United States District Court
For the District of New Jersey
D.C. Civil No. 80-0238

Argued November 18, 1983

Before: HIGGINBOTHAM, BECKER, *Circuit Judges*,
and NEWCOMER,* *District Judge*

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*Honorable Clarence C. Newcomer, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Reargued In Banc November 13, 1984

Before: ALDISERT, *Chief Judge*, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and BECKER, *Circuit Judges*

Opinion filed January 16, 1985

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OPINION OF THE COURT

HUNTER, *Circuit Judge*

1. The issue on this appeal, considered by the court in banc, is whether, under admiralty law, damage to a

product caused by a design defect is recoverable in tort. We hold that such damage is not recoverable in tort. We hold that such damage is not recoverable in tort where the design defect does not pose an unreasonable risk of harm to persons or property other than the product itself, as measured by the nature of the design defect, the manner in which the defect manifests itself, and the nature of the inherent risk, if any, created by the design defect.

I.

2. The plaintiffs-appellants ("the charterers") are bareboat charterers of four supertankers, who seek recovery for losses caused by allegedly defective turbines designed and manufactured by defendant-appellee Delaval Turbine, Inc. ("Delaval"), and installed on the supertankers. Component parts on the turbines of all four ships were replaced after problems in operation arose, causing loss to the charterers in the nature of costs of replacement and repair, and lost profits from "downtime." No personal injury or property damage, however, other than to the turbine parts, resulted from the malfunctions.

3. The four supertankers were constructed by Seatrain Shipbuilding Corporation ("Seatrain") in Brooklyn, New York, and were christened the STUYVESANT, the WILLIAMSBURGH, the BROOKLYN, and the BAY RIDGE. Seatrain contracted with Delaval to provide high pressure turbines to serve as the main propulsion units in these vessels, and to supervise the installation of the turbines.

4. The STUYVESANT was completed on or about July 1, 1977, and commenced service. In December 1977, near the port of Valdez, Alaska, the STUYVE-

SANT's high pressure turbine malfunctioned. Superheated steam was leaking from the junction between the turbine's casing and the steam inlet control valve chest. Interim repairs were made at Valdez, but problems with the high pressure turbine recurred shortly after the STUYVESANT departed from the port. The charterers allege that these problems, which lowered turbine pressure and reduced the ship's speed, endangered the STUYVESANT during a storm that it encountered off the coast of Alaska. An unsworn document submitted by the charterers in opposition to summary judgment represents that because of the lack of power and "mountainous seas," estimated to be at least 65 feet high, the vessel drifted toward the lee shore of the Gulf of Alaska. The STUYVESANT eventually made headway, however, and continued on a seven-week journey to Panama. After leaving Panama and upon further traveling to San Francisco, an inspection of the STUYVESANT revealed damage to several parts of the turbine, including the first stage steam reversing ring. The damaged parts were replaced by parts taken from the BAY RIDGE, which was still under construction.

5. In April 1978, following another voyage, the first stage steam reversing ring of the STUYVESANT's high pressure turbine, which had been taken from the BAY RIDGE, was found to have deteriorated, and was replaced by another ring taken from the BROOKLYN. In August 1978, the ring was again replaced—this time by a newly-designed ring manufactured by Delaval, which presumably corrected the defect in the earlier ring.

6. The BROOKLYN was completed in December 1973, and the WILLIAMSBURGH was completed in December 1974. After the inspection of the STUYVESANT turned up problems with its turbine. both the BROOKLYN and WILLIAMSBURGH, which were already in service, were inspected. These inspections revealed damage similar to that found in the STUYVESANT's high pressure turbine. The damaged parts were repaired and reinforced by Delaval. Subsequently, in the summer of 1978, the first stage steam reversing rings of both ships were replaced by newly-designed rings identical to the one placed in the STUYVESANT. Between December 8, 1979, and January 24, 1980, additional repairs were made on the WILLIAMSBURGH's low pressure turbine. All of these repairs and replacements took place in port.

7. The BAY RIDGE was completed in early 1979. Although its high pressure turbine operated with one of Delaval's newly designed rings, its low pressure turbine suffered damage in March 1980, allegedly as a result of the improper installation of the vessel's astern guardian valve. The BAY RIDGE was temporarily repaired in Talcahuano, Chile, after which it resumed its journey to Valdez.

8. The charterer's second amended complaint contains five counts. The first four counts allege strict liability in tort, based on the alleged defects in the turbines manufactured by Delaval for the STUYVESANT, the WILLIAMSBURGH, the BROOKLYN, and the BAY RIDGE, respectively. The fifth count alleges negligence in the installation of the astern guardian valve of the BAY RIDGE. The second amended complaint invokes jurisdiction on the basis of Fed. R. Civ. P. 9(h) (admiralty), and the district court treated all of the counts of the complaint as being governed by federal maritime law. Delaval moved for summary judgment, arguing that the charterers' claims were solely for economic loss, and that such loss was not recoverable in tort.

9. In an opinion filed on October 5, 1982, the district court adopted the majority common-law position that losses caused by qualitative product defects are not re-

coverable in tort absent unreasonable risk of harm to persons or property other than the product. *See Pennsylvania Glass Sand v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981). The court granted summary judgment on counts one through four on the basis that the strict liability allegations failed to state a cause of action in admiralty with respect to any of the vessels. The district court denied summary judgment on the negligence claim at that time, but in an opinion and order filed on January 24, 1983, reversed itself and granted Delaval's motion for summary judgment in its entirety. We affirm.

II.

10. The first issue we must decide is whether the charterers' claims are within the maritime jurisdiction of the federal courts. 28 U.S.C. § 1333(1) (1982). The district court found that all five counts were within maritime jurisdiction because the "nature of the" vessels as mammouth oil tankers engaged in international commercial trade places them and the functioning *vel non* of their turbines close to the heart of federal admiralty concerns." (A-259). We agree.

11. In *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972), the Supreme Court set forth a flexible two-part test for determining whether a claim is maritime in character and hence within the admiralty jurisdiction of the federal courts. First, there must be a "maritime locale" to the event that led to the litigation, and second, there must be a relationship between the wrong and traditional maritime activity. Addressing the second test first, we believe it undisputable that a close nexus exists between a malfunctioning turbine in a sea-going supertanker and the traditional maritime activity of shipping. The alleged wrong in this case involves commercial facets of maritime activity, and also implicates

the traditional maritime concern of safe shipping. *See, e.g., Sperry Rand Corp. v. Radio of America*, 618 F.2d 319 (5th Cir. 1980).

12. We also find that that a "maritime locale" is involved in all five counts of the charterers' second amended complaint. The parties agree that the events that form the basis for the first and fifth counts occurred at sea. The damage to the STUYVESANT's high pressure turbine (first count) and the BAY RIDGE's low pressure turbine (fifth count) occurred while the turbines were in use and while the ships were at sea, and was discovered while the ships were at sea. Similarly, although the damage to the BROOKLYN (second count) and WILLIAMSBURGH (third count) turbines was not discovered until the ships were in port, the damage in fact occurred at sea while the turbines were in use, and thus a maritime locale exists.[1] Finally, although the question is close, we find that a maritime locale also exists for the claim arising from damage to the BAY RIDGE's high pressure turbine (fourth count), even though the BAY RIDGE itself was never put to sea.

13. The charterers of all four supertankers allege the same basic claim: an alleged defect existed in each high pressure turbine's first stage steam reversing ring, which caused the ring to deteriorate and disintegrate in operation, with resulting damage to other component parts of the turbines. (App. at 26–31). This defect manifested itself over a period of time during the turbines' operation. After the STUYVESANT experienced initial problems with its turbine while at sea, an inspection was made, and the defective and damaged parts were re-

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1. We also note that a ship in port is considered to be in a "maritime locale." *See, e.g., Southern Steamship Co. v. NLRB*, 316 U.S. 31, 41 (1942).

moved, including the first stage steam reversing ring. Instead of ordering new parts from Delaval, arrangements were made to transfer certain component parts from the BAY RIDGE turbine, which was then in construction, to the STUYVESANT. (App. at 198-99). These allegedly defective component parts, from which flow the basis of the BAY RIDGE claim for damages, were then installed in the STUYVESANT. The STUYVESANT went back to sea, and again experienced problems with its turbine. Upon docking and inspection, it was discovered that the first stage steam reversing ring, the ring originally installed in the BAY RIDGE, had deteriorated and was thus damaged. (App. at 199). Thus, as with the other three supertankers, the defect in the central component part of the BAY RIDGE turbine manifested itself while the part was in operation on the sea. Although the ship itself never left port, the allegedly defective part did, and the basic damage for which recovery flows occurred in operation and on the sea. Accordingly, a maritime locale exists for all counts of the charterers' second amended complaint, including the fourth, and admiralty jurisdiction properly exists in the federal courts.

III.

14. Because this case properly falls within the maritime jurisdiction of the federal courts, the appropriate law to apply is the federal common law of admiralty. This court has recognized that concepts of products liability, including Restatement (Second) of Torts § 402A (1965), are applicable in admiralty law. *See Ocean Barge Transport Co. v. Hess Oil Virgin Islands Corp.*, 726 F.2d 121, 123 (3d Cir. 1984). In defining the contours of products liability doctrine in admiralty law, courts have consistently looked to the law of the land,

and have relied on many of the same policy concerns that underlie the land-based products liability decisions. *See, e.g., Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129, 1134 (9th Cir. 1977); *Lindsay v. McDonnell-Douglas Aircraft Corp.*, 460 F.2d 631, 635 (8th Cir. 1972); *Schaffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217, 221 (6th Cir. 1969).

15. The charterers argue that there is no need to look to the law of the land, and invoke venerable precepts and cases that are said to demonstrate admiralty's hospitability to total compensation for casualty inflicted by the fault of another, including total loss of the use of a vessel. They cite, *inter alia*, to the principle of "restitutio in integrum," *see Natalie Tankships Corp. v. Panama Canal Commission*, 506 F.Supp. 281, 285 (D. Canal Zone 1980), and to Justice Story's opinion in *The Appollon*, 22 U.S. (9 Wheat.) 362 (1824), and argue that admiralty has traditionally allowed recovery in tort for losses incurred when a ship is rendered inoperable by the act of another. Although the charterers' argument is based on cases involving traditional maritime torts, such as collisions and unlawful detention, it is submitted that these cases are indistinguishable in principle from this case.

16. It is true that recovery for the value of the use of a ship for the time it is put out of use by tortious conduct is traditionally an element of damages in a tort suit. This element of damages is known as "demurrage." *See, e.g., The Conqueror*, 166 U.S. 110, 125 (1897); *Williamson v. Barrett*, 54 U.S. (13 How.) 101, 110-12 (1851) (collision case); *The Appollon*, 22 U.S. (9 Wheat.) 362, 376 (1824) (detainer case); *Skou v. United States*, 478 F.2d 343, 345 (5th Cir. 1973) (detainer case); *The Hygrade No. 24 v. The Dynamic*, 233 F.2d 444, 445-6 (2d Cir. 1956) (collision case). In these cases, the traditional tort policy of full compensation is enforced in admiralty, as it is on land.

17. The question we address, however, is not what losses can be recovered once an act has been characterized as a tort, but whether under the modern law of products liability, as it has been imported into the law of admiralty, a products liability complaint that seeks recovery for damage to a product caused by a design defect states a cause of action in tort. We believe that the better view, and one in accord with the prevailing view on land, is that damage to a defective product is not actionable in tort unless the design defect creates an unreasonable risk of harm to persons or property other than the product itself. *See, e.g., Seely v. White Motor Corp.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965). *But see Santor v. A&M Karagheujian, Inc.* 44 N.J. 52, 207 A.2d 305 (1965) (loss for qualitative product defects without risk of harm may be recoverable in a tort action).

18. The requirement of unreasonable risk of harm is consistent with the policies behind tort law. As Judge Adams noted in *Pennsylvania Glass Sand v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1169-70 (3d Cir. 1982) ("*PGS*"):

> Tort law rests on obligations imposed by law, rather than by bargain, and the thrust of § 402A is that as a matter of public policy a duty should be imposed on manufacturers to "warrant" the safety of their products. The gist of a products liability tort case is not that the plaintiff failed to receive the quality of product he expected, but that the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or his property. On the other hand, contract law, which protects expectation interests, provides the appropriate set of rules when an individual wishes a product to perform a certain task in a certain way, or expects

> or desires a product of a particular quality so that it is fit for ordinary use.

19. In *PGS*, for example, the plaintiff sought recovery for damages incurred as a result of a fire in a front-end loader manufactured by the defendant. The loader did not come equipped with a system to suppress or extinguish fires, a defect which manifested itself one day when a fire suddenly broke out near the loader's hydraulic lines. Because the operator hastily evacuated the machine without turning off the motor, the fire quickly spread, fueled by hydraulic fluid. As a result of the fire, the plaintiff incurred expenses in repairing the machine and securing a replacement.

20. In determining whether tort law should provide a remedy for the plaintiff's losses, the court in *PGS* considered the nature of the defect, the manner in which the defect manifested itself, and the nature of the risk which was inherent in the defect. The court held that because the design defect was safety-related, because the defect could and did manifest itself in a sudden and calamitous manner, and because the safety hazard posed a serious risk to persons and property, the plaintiff stated a cause action in tort for the damages it suffered.

21. In our view, the test enunciated by Judge Adams in the *PGS* decision correctly balances the competing policies present in maritime law as well as in the law of the land. The charterers have not offered, and we do not discern, any persuasive difference between an action which seeks recovery for a defective ship engine and an action which seeks recovery for a defective car engine. In both cases, the law seeks to leave the parties to their bargain, while at the same time protecting consumers of both ships and cars from hazardous defects in the engines. *Cf. Ocean Barge Transport Co. v. Hess Oil Virgin Islands Corp.*, 726 F.2d 121 (3d Cir. 1984) (applying

land-based products liability decisions to suit alleging defect in ship's crane).[2]

IV.

22. Applying the test of *PGS* to the instant case, therefore, requires us to examine the circumstances of the charterers' claims, including the nature of the alleged defect, the manner in which the injury to the defective product occurred, and the type of risk that is inherent in the defect. The nature of the defect in this case appears qualitative, as opposed to safety-related. The charterers contend that certain component parts of the Delaval turbine were defective, and that they caused the turbine to malfunction. The defect involved internal deterioration and breakdown of the turbine's parts, and thus directly implicates the intended performance level of the turbine and the charterers' disappointed expectations in their purchase. Unlike the defect in those cases in which tort recovery is allowed for a damaged product, the defect in this case is not intimately related to the safety of the product, nor is it associated with calamitous events like fire or sudden collision. *See, e.g., PGS*, 652 F.2d at 1174 (front loader defective because of lack of fire suppression system); *Cloud v. Kit Mfg. Co.*, 563 P.2d 248

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2. Our reasoning in this case is equally applicable to products liability cases brought in negligence and those brought in strict liability, and thus is applicable to all five counts of the second amended complaint. One of the cases we rely on in the text. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17. 403 P.2d 145 (1965), involved negligence as well as strict liability claims, and the court in that case did not distinguish between the two theories in applying the rule against recovery of damages where an unreasonable risk of harm is not present. *See also Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 950 (11th Cir. 1982) (applying Georgia law); *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 285-88 (3d Cir. 1980) (applying Illinois law).

(Alaska 1977) (mobile home defective because of highly-flammable carpet padding).

23. We also find that the manner in which the damage to the turbine occurred implicates the expectation-bargain policy of warranty law rather than the safety-insurance policy of tort law. *PGS*, 652 F.2d at 1173. In all the ships, the damage to the turbines occurred during normal operation of the turbine, and resulted from the gradual and unnoticed deterioration of the turbines' component parts. Indeed, it was not until the STUYVESANT experienced steam leakage and decreased power because of the disintegration of the first stage steam reversing ring that the charterers' discovered the defects in all the ships and the damage it caused. Unlike *PGS*, there was no "sudden or calamitous" event which triggered the manifestation of the defect and the resulting damage. *See, e.g., PGS*, 652 F.2d at 1174 (sudden fire, combined with lack of fire suppression system, caused total loss of front loader); *Cloud v. Kit Mfg. Co.*, 563 P.2d 248 (Alaska 1977) (fire, combined with highly-flammable padding, severely burned mobile home); *Cornell Drilling Co. v. Ford Motor Co.*, 241 Pa. Super. 129, 359 A.2d 822 (1976) (sudden fire in unoccupied, sitting truck damaged cab).

24. Finally, we must consider the type of risk, if any, that is inherent in this type of qualitative defect. Because the defect involved gradual deterioration of the turbine's inner mechanisms, the defect did not pose a risk of sudden or calamitous injury to persons or property. Instead, the risk created by the defect was that the turbine would operate at a lower capacity, thus reducing the ship's speed and causing the charterers' losses in the form of down-time for repair and lost profits. We believe that this type of risk, rather than implicating a manufacturer's obligation to place safe products in the stream of

commerce, only concerns the charterer's expectations as to the commercial suitability of the product.

25. Consideration of the three *PGS* factors, therefore, leads us to the conclusion that the defective turbine did not pose an unreasonable risk of harm to persons or property, and thus that the charterers have failed to state a cause of action in tort. The charterers contend, however, that the defective turbine placed the STUYVESANT and its crew in peril during a storm off the Gulf of Alaska, and thus that tort recovery is appropriate. Even assuming that such allegations of imminent danger are credible,[3] we nonetheless find that because no persons or property were injured or damaged, no tort recovery is appropriate in this case given the qualitative nature of the defect and the gradual manner in which the defect manifested itself.

26. We find, therefore, that the district court, applying the rationale of *PGS*, properly granted summary judgment in favor of Delaval on all five counts of the second amended complaint. The judgment of the district court will be affirmed.

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3. In an unsworn letter, the STUYVESANT's master noted that because of the turbine's malfunction, the STUYVESANT could not reach top speed, and thus had difficulty making headway into a storm off the Gulf of Alaska. (App. at 206). The difficulty caused the master to fear that the ship would drift hazardously close to the lee shore of the Gulf. The ship, however, did successfully travel against the storm, and in fact proceeded to Panama, a voyage of some seven weeks. Indeed, after unloading its cargo at Panama, the ship proceeded to San Francisco, where the turbine was examined for problems. As the district court stated, "any nascent allegations of acute peril to the ship or crew resulting from the turbine defect are belied by the course of action undertaken after the defect manifested itself." (App. at 264).

GARTH, *Circuit Judge*, concurring:

I would affirm the district court's grant of summary judgment in favor of Delaval, but I would do so on grounds somewhat different from those on which the majority relies.

I believe the governing issue in this appeal is whether a mere qualitative product defect, which presents no unreasonable danger and which occasions no actual harm to persons or property beyond damage to the defective product itself, suffices to state a section 402A claim in strict liability in tort. In my opinion, no such strict liability claim has ever been stated by the charterers. Thus, although I would agree with the majority's analysis were a section 402A claim actually before us, the initial failure of the charterers even to allege the necessary elements of a products liability claim must itself preclude analysis of Delaval's purely hypothetical tort liability. My difference with the majority, though slight, is therefore significant.

Additionally, I cannot agree that the BAY RIDGE Count (Count 4) comes within admiralty jurisdiction. Instead, Count 4 must be dismissed, but its dismissal must result from the application of the principle established in *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187 (3d Cir. 1976).

I.

In land-based products cases, a manufacturer's tort liability is premised upon a duty to sell products that are not "in a defective condition unreasonably dangerous" to a user's person or property. Restatement (Second) of

Torts § 402A (1977).[1] A manufacturer who violates this duty is subject to liability for any harm caused. The scope of section 402A, however, is not so broad as to allow the mere allegation of a qualitative defect to state a cognizable tort claim in the absence of allegations or proof of unreasonable danger and demonstrable injury.

This court has previously held that section 402A applies to cases within the admiralty jurisdiction where all elements of a section 402A cause of action have been met. *See Ocean Barge Transport Co. v. Hess Oil Virgin Islands Corp.*, 726 F.2d 121, 123 (3d Cir. 1984). Yet, to import recognized concepts of products liability law into federal maritime law is not to abandon the well-established threshold requirements for strict tort liability. An examination of the charterer's original and amended Complaints reveals that they allege no more than that the involved turbines were defective. One can search in vain for any allegation of unreasonable danger or actual injury—hallmarks of a section 402A claim. Count 1, pertaining to the STUYVESANT, alleges merely that Delaval negligently designed and manufactured the ship's turbine so that it was not reasonably fit for its

1. Section 402A of the Restatement (Second) of Torts provides:
Special liability of Sellers of Products for Physical Harm to User of consumer.
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if,
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

intended purposes. Counts 2 through 4 repeat these allegations for each vessel.

Looking only to the Complaint, it is clear that no 402A claim was ever stated. Contrary to the majority's reading of the Complaint which recites that "the first four counts allege strict liability in tort, based on the alleged defects in the turbines . . ." (Maj. Op. typescript at 6), there is not the slightest hint or reference in any of the Complaint's four counts to "Section 402A," "strict liability," "unreasonable danger," or "injury." Instead, the Complaint as drawn and amended, whether construed as one in contract or in negligence, addresses issues generally characteristic of contract actions for breach of warranty.[2]

If we were testing this action by the standards attributable to a breach of warranty or contract complaint, I would find little fault with the cause of action that is stated. However, a contract or breach of warranty cause of action should not masquerade in section 402A trappings, particularly in an admiralty context. Indeed, in these proceedings, the disguise is transparent and has been unmasked in the summary judgment proceedings which followed the Complaint. Nowhere in any count of the Complaint have the charterers alleged that Delaval's products—the turbines—were unreasonably dangerous or caused injury, both of which are elements essential to the statement of a 402A claim.

Nor do the affidavits submitted in opposition to Delaval's motion for summary judgment establish any such injury or danger. Indeed, the sole evidence offered by the charterers to supply their missing allegations of unreasonable danger is an unsworn letter from the STUYVESANT's master who states that the malfunctioning

2. The record discloses that no actions may now be maintainable under the warranties given by Delaval.

turbine endangered the STUYVESANT during a storm encountered off the Alaskan coast. Although the underpowered vessel drifted toward the lee shore of the Gulf of Alaska, the ship successfully navigated the storm and sustained no injury. Thus, whether measured by the Complaint alone or by the Complaint and motion proceedings, no 402A claim has ever been established.

No matter how liberally we may construe section 402A, the qualitative defects manifested by the turbine's gradual internal deterioration cannot be made to substitute for the actual injury or unreasonable danger required as a predicate to strict tort liability. At oral argument, counsel for the charterers suggested that the simple presence of a defect should trigger tort liability. This approach would effectively require a manufacturer to become the general insurer of its products' performance throughout their reasonably productive lives, regardless of the dangers posed by such products. If, however, the mere existence of a defect were sufficient to impose strict liability, the threshold for a strict liability products action would be crossed whenever a product failed to satisfy a user's expectations.

As I have previously observed, the charterers have attempted to translate their predominantly contract based warranty claims into products liability claims. They should, however, be remitted to whatever contract remedies, if any, remain to them under the applicable agreements. Thus, although the majority opinion has chosen to meet the issue of section 402A liability directly, I suggest the issue itself is nonexistent.[3] My reading of the

3. When asked at oral argument how the 402A issue arose, neither counsel was able to answer the question satisfactorily. Indeed, that counsel should center their arguments around whether under admiralty law economic loss may be recovered in a products liability action, without first addressing whether the factual predicate to liability ever existed, is incomprehensible. Both counsel, in their

record reveals that there never has been, nor is there now, a viable 402A claim upon which we could rule. I would therefore affirm the district court's grant of summary judgment with respect to Counts 1, 2, 3, and 5 because no cognizable strict liability tort claims ever existed.

II.

I must further disagree with the majority's conclusions that admiralty jurisdiction exists over Count 4 of the amended Complaint. That Count alleges defective design and manufacture of the BAY RIDGE'S turbines. The defects at issue, however, were discovered and repaired while the BAY RIDGE was under construction and before the BAY RIDGE put to sea. The sole connection of the allegedly defective BAY RIDGE turbine with a maritime locale arises because parts from the BAY RIDGE's engine were used to replace parts in the STUYVESANT's turbine. When the BAY RIDGE itself was finally complete, it was equipped with a redesigned turbine.

Accordingly, although the claim advanced by Count 4 may evince sufficient connection with traditional mari-

briefs and argument, focused solely upon the availability of economic loss in an admiralty 402A case. As I understand the concept of economic loss that was advanced, it would consist of essentially consequential damages resulting from the defective turbines—a measure of damages more traditionally associated with warranty or contract claims.

I applaud the majority's decision not to address the economic loss argument, as that argument was never properly part of this case. Any discussion of the kinds of damages available in a bona fide 402A claim brought in admiralty can here by only speculative. Jurisprudence counsels that the issue of damages, and particularly the question whether economic loss can ever be recovered in a legitimate admiralty 402A action, should await decision in a case where the pleadings clearly state a 402A claim. Only after an initial finding of strict liability should a court address the kind and amount of damages which a plaintiff may recover.

time activity to satisfy the second requirement (traditional maritime activity) of the jurisdictional test enunciated in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972), it fails to satisfy the first requirement of a "maritime locale." [4]

The majority opinion attempts to avoid the jurisdictional limits imposed by *Executive Jet* by reasoning that the use of the BAY RIDGE'S steam reversing rings in the STUYVESANT and the subsequent malfunction of those parts at sea supplies an adequate maritime locale for all Counts. The majority's reasoning, while ingenious, is wrong. The part cannot be said to yield jurisdiction over the whole. Sending a turbine to sea, let alone only a portion of a turbine, is not sending a ship to sea.

Presumbly, under the majority's logic, if an engine manufactured in Detroit were shipped through the St. Lawrence Seaway and down the Atlantic Coast to the

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4. The majority opinion (typescript at 8, n.1) relies upon Southern Steamship Co. v. NLRB, 316 U.S. 31, 41 (1942) for the proposition that a ship in port is in maritime locale. *Southern Steamship* dealt with a strike on board a ship away from her home port and lying at anchor in another domestic port. The Court held that for purposes of determining whether the strike was mutiny within the meaning of 18 U.S.C. § 483, 484, a port could be deemed a maritime locale. The Court's decision did no more than reaffirm the traditional rule that for a vessel in service, a port or harbor was within the maritime jurisdiction. *Id.*

In the present case, no one disputes that discovery of the damage to the BROOKLYN and the WILLIAMSBURGH, while these ships were in port, yields a maritime locale. Those ships, however, had put to sea and had sustained damage at sea.

Neither *Southern Steamship* nor *Executive Jet* can be read to overcome the well-established maritime rule that contracts to construct ships are nonmaritime in nature and hence not within the admiralty jurisdiction. *See, e.g.*, Kossick v. United Fruit Company, 365 U.S. 731 (1965); Ohio Barge Lines, Inc. v. Dravo Corp., 326 F. Supp. 863 (E.D. Pa. 1971). The BAY RIDGE, while under construction, cannot be deemed to have a maritime locale.

Brooklyn Navy Yard where it was installed in a vessel under construction, admiralty jurisdiction would exist over all subsequent complaints about the engine, whether or not the vessel ever put to sea. I do not believe this is an allowable jurisdictional principle within the meaning of *Executive Jet*.

Moreover, even if the majority opinion were correct in attaching admiralty jurisdiction to a steam reversing ring taken from the BAY RIDGE and then installed in the STUYVESANT, logic dictates that any resultant admiralty jurisdiction would derive from the STUYVESANT's *activity and locale* and not the BAY RIDGE's. Thus, all that the majority may have established is that the STUYVESANT came within admiralty jurisdiction, a matter which was never in dispute and which was demonstrated by the events related under Count 1. Hence, the attempt to find admiralty jurisdiction over Count 4 is futile, since Court 4 concerns only the BAY RIDGE which was still in dry dock. I therefore disagree with the analysis leading to the majority's holding that admiralty jurisdiction exists over Count 4.

III.

Because the grant of summary judgment on all other Count leaves no remaining federal questions to which Count 4 may be appended, the BAY RIDGE claim must be dismissed for lack of federal jurisdiction. *See Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 196 (3d Cir. 1976) (where no substantial federal claim to which the state claim could be appended remains, the primary justification for the exercise of pendent jurisdiction is absent).

I, too, would thus affirm the result reached below, although for reasons other than those articulated by the district court, see *PAAC v. Rizzo*, 502 F.2d 306 (3d Cir. 1974), and expressed in the majority opinion.

BECKER, *Circuit Judge*, concurring and dissenting:

I share the majority's view that the *Pennsylvania Glass Sand v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1982) ("PGS"), standard should be adopted in strict products liability actions in admiralty where an injured party has made a claim for economic loss. This standard provides that products liability principles apply when a hazardous product exposes a plaintiff to "an unreasonable risk of injury to [plaintiff's] person or [plaintiff's] property." *Id.* at 1169. Accordingly, I join in Parts I and III of the majority opinion and in the consequent affirmance of the grant of summary judgment for Delaval on counts II, III, and V of the Charterer's second amended complaint because these counts do not implicate an unreasonable risk of harm to person or property. In my view, however, the exposure of the disabled STUYVESANT to a storm of "mountainous seas" created an unreasonable risk of harm and otherwise met the *PGS* standard. Therefore, I cannot join in Part IV of the majority opinion in which the majority applies *PGS* to count I of the complaint so as to affirm the grant of summary judgment, I would vacate the grant of summary judgment for Delaval on count I and remand for further proceedings.

I also join in Part II of Judge Garth's concurring opinion. Even though shipbuilding is a traditional maritime activity, maritime jurisdiction does not exist without some nexus to a maritime locality. I believe, with Judge Garth, that the majority is simply wrong in concluding that a maritime locality exists when economic loss due to a product defect is claimed for a vessel that has never

been commissioned, because the vessel has been "cannibalized" and one of its parts has been put to sea on another ship and then returned to the aggrieved vessel. Judge Garth has explained in a forceful manner why we have no maritime jurisdiction over count IV, and I will not address the point further.[1] I will therefore limit the remainder of this separate opinion to a discussion of the STUYVESANT claim (count I).

I fully agree with the majority's conclusion that, in the maritime context, tort principles may apply when a defect causes only damage to the defective product itself, with no attendant injury to persons or other property.[2]

1. Because under my view of the case count I would survive summary judgment, there would be a valid federal claim to which count IV could be appended. Assuming, however, that count I does not survive summary judgment, Judge Garth appears to be correct when he states that Tully v. Mott Supermarkets, Inc., 540 F.2d 187 (3d Cir. 1976) would require dismissal of count IV for want of federal subject matter jurisdiction. *Tully* would seem to require dismissal of count IV, a pendent claim arising from a common nucleus of operative fact, *see* Gibbs v. United Mine Workers, 383 U.S. 715 (1966), even though the now-dismissed federal claim to which count IV was originally appended is within the exclusive jurisdiction of the federal courts and, hence, could not have been brought in state court. The federal claim in *Tully* arose under § 10(b) of Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), another area in which the federal courts exercise exclusive jurisdiction. *See* Securities Exchange Act of 1934, § 27 (codified at 15 U.S.C. § 78aa). Were I of the view that count I does not survive summary judgment, and a majority of the court were in agreement. I would think it appropriate for the in banc court to address specifically the correctness of the *Tully* result, at least in the admiralty context. *See In re* Oil Spill By Amoco Cadiz Off Coast of France, 699 F.2d 909, 913-14 (7th Cir. 1983) (dictum) (suggesting that the "strong admiralty policy in favor of providing efficient procedures for resolving maritime disputes" counsels in favor of a liberal approach to joinder, notwithstanding decisions rejecting pendent jurisdiction in the diversity context); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 811 (2d Cir. 1971).

2. This conclusion, although implicit through much of the majority's opinion, is finally made explicit in the following statement of

The majority has done so by embracing a test, cogently articulated by Judge Adams in *PGS*, that is intended to identify when a defect that has injured only the defective product itself has caused "an unreasonable risk of harm" and has thereby implicated products liability principles.[3] In view of the foregoing, I would have joined in the majority opinion except that I disagree with its application of the *PGS* test.

In *PGS* the court focused upon three factors in an effort to identify "whether the safety-insurance policy of tort law or the expectation-bargain policy of warranty law is most applicable to [the] particular claim." *PGS*, 652 F.2d at 1173. These "interrelated" factors, specifically adopted by the majority, are the nature of the defect, the type of risk, and the manner in which the injury arose. *Id.* The majority applies these factors to the allegations in this case and concludes that the policy of tort law is not implicated because the defect was qualitative in nature and because the defect manifested itself in a gradual manner.

In considering the nature of the defect, the majority's underlying analysis is intended to identify whether the defect at issue in the case can be seen as having a nexus to product safety sufficient to implicate strict liability principles.[4] Although this focus is consistent with both *Seely*

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the holding: "we . . . find that *because no persons or property were injured or damaged*, no tort recovery is appropriate in this case given the qualitative nature of the defect and the gradual manner in which the defect manifested itself." Maj. typescript op. at 16 (emphasis added).

3. The majority has, appropriately, rejected the contrary rule which allows only contract remedies when the defective product alone is damaged by a defect. *See, e.g.*, Mid-Continent Aircraft v. Curry County Spraying Service, 572 S.W.2d 308 (Tex. 1978).

4. The terms, "qualitative" and "safety-related," used by the majority to describe the focus of this analysis are, I believe, misleading.

v. White Motor Co., 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), and *PGS*,[5] the majority's conclusion that the defect in the turbine was not "safety-related" is, in my view, unwarranted. The majority's error in this regard is evident if one compares the nature of the defect in this case with the nature of the defect in *PGS*. The application of tort principles was appropriate in *PGS* because the lack of sprinklers and fire-safety instructions for a front-loader poses a serious risk to persons, property, and the product itself in the event of a fire. Similarly, based on the allegations in this case, the application of tort principles is appropriate because the defect in the STUYVESANT's turbine that rendered it useless in powering the ship posed a serious risk to persons, property, and the product itself in the event the power failure occurred when there was some unrelated danger at sea that required a vessel with full power. In both cases, therefore, the defects substantially increased the risk of serious physical injury or property damage and thereby

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I recognize that the majority's shorthand use of the terms is fully consistent with *PGS*. *See, e.g.*, 652 F.2d at 1172. Nevertheless, it is apparent that all defects that cause damage are qualitative and defects that cause injury or imminent peril are also safety-related. Both the lack of precision in these terms and their at least partial overlap may account for the majority's uncritical decision to label as "qualitative" the defect in the ship's turbine.

5. The conclusion in *Seely* and *PGS* that product liability law applies only if the defect is hazardous is in marked contrast to the analysis and rule established in Santor v. A & M Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965). In *Santor*, the court did not focus its analysis on the proper interrelationship between contract and tort in the context of economic loss, but on the use of tort and warranty-based products liability theories in breaking down the "citadel of privity" in defective products cases. The court felt that these latter principles applied regardless of whether the defect was hazardous or qualitative. *Santor's* analysis is based on the paradigm of a manufacturer whose goods are sold to individual consumers whose only information about the quality of a product is the reputation of the manufacturer. The opinion focused on two characteristics of this

implicated the concerns of public safety that underly tort law.[6]

My analysis should not be read as suggesting that all defects are safety-related once they become manifest. For example, it is useful to contrast the defects at issue in this case and *PGS* with a defect in a turbine used to power an automated assembly plant. If the consequence of this hypothetical defect were that the assembly-line

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market place: the seller's greater knowledge and greater bargaining power. Under such circumstances, *Santor* concluded, simple justice requires that the manufacturer guarantee the quality of the product. I believe that this expansive approach to products liability in tort unnecessarily infringes freedom of contract. It is worth noting in this regard that two other courts of appeals have allowed recovery for economic loss when a defect has resulted in damage only to the defective product despite the fact that the three *PGS* factors would indicate that recovery in tort was not appropriate. *See* Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813 (11th Cir. 1984) (allowing recovery of economic loss due to delays and expense caused by a faulty engine to ship owners and others with an interest in the lost fishing catch, but limiting its holding to the facts of the case); Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468, 1472-74 (9th Cir. 1984) (declining to follow *Seely* and holding that a fishing vessel could recover repair costs and lost profits caused by a defective hose).

This brief reference to *Santor* is also of relevance, because, under my theory, count IV states a pendent state law claim. The charterers argue that the claim should be governed by the law of New Jersey and that under New Jersey law, as embodied in *Santor* and its progeny, they are entitled to recover for their purely economic losses.

6. The majority, in fact, suggests in its opinion that a defect in a ship's engine or turbine would in some cases implicate tort principles. *See* maj. typescript op. at 13 ("In [cases of defective ship and car engines], the law seeks to leave parties to their bargain, while at the same time protecting consumers of both ships and cars from hazardous defects in the engines."] The majority does not articulate in any detail why the manifestation of the defect alleged in this case was not "hazardous," given the fact that it left a ship without power during a severe storm at sea. The majority also does not provide any specific examples of engine defects that it would consider sufficiently hazardous to implicate strict liability principles.

machinery simply stopped performing, product liability principles would not be implicated. *Cf. Posttape Associates v. Eastman Kodak Co.*, 537 F.2d 751, 755 (3d Cir. 1976) ("The flaw in the film in no way made it a threat to person or tangible property. The product did not perform as expected, but by no stretch of the imagination could it be considered 'unreasonably dangerous.' "). I believe that it is a hypothetical defect of this type that the first *PGS* factor (the nature of the defect) indicates does not implicate tort principles. We are not, however, considering defective assembly-line machinery or flawed film. In this case, considerations of public safety are clearly implicated because a design defect has allegedly caused the breakdown of a product that powers a ship and has thereby caused imminent peril and near catastrophe. In sum, the majority fails to consider the "nature of the defect" in a manner consistent with the *PGS* framework.

The majority's second reason for deciding that there is no unreasonable risk of harm in this case is "the gradual manner in which the defect manifested itself." Once again, I am in agreement with the focus of the majority's analysis: A court must examine the context in which a claim arises to ensure that the policy concerns of tort law are, in fact, implicated, that is unless tort recovery is to be permitted any time a claim is made for damages to a product that result from a safety-related defect. The necessity of this limitation on tort recovery may be illustrated by reference to the facts in *PGS*, a case in which the majority concludes the defect was "intimately related to the safety of the product." Maj. typescript op. at 14. Notwithstanding this close nexus to product safety, if the defect had been detected during a fire safety inspection so that repairs could have been made prior to any calamitous injury by fire, an inquiry into to "manner in which the defect manifested itself" would indicate that recov-

ery under tort principles was not appropriate. Recovery in *PGS* was warranted not only because the design defect became manifest in circumstances that were sudden, but also, and more importantly, because the circumstances posed a significant threat of injury to person and property. *See PGS*, 652 F.2d at 1174 ("Here, the damage to the front-end loader was the result of a fire—a sudden and highly dangerous occurrence."). The latter fact is the critical fact—the "suddenness" would seem secondary. Although in *PGS* the defect was the absence of a sprinkler system, in the typical case of a mechanical breakdown caused by a defect, there will be deterioration over time culminating in the manifestation of the defect.

I believe that circumstances highly analogous to those existing in *PGS* are at least alleged in this case. Although I would agree that the defect in the turbine might be characterized as one that caused "internal deterioration" as it powered the STUYVESANT, the defect nevertheless caused a complete breakdown that allegedly enhanced a preexisting, unrelated danger, namely a violent storm at sea. Thus, the turbine's defect became manifest in a "sudden and highly dangerous" context, thereby suggesting that tort principles ought to apply. Whether the deterioration in the turbine could have been detected earlier by close inspection is an issue as irrelevant to a correct decision in this case as the consideration of whether fire safety inspectors could previously have assessed the front-loader's defect would have been to the decision in PGS.

Stated briefly, I believe that the test outlined in *PGS* and adopted by the majority has to be clearly focused on two issues if it is to be effective in identifying cases that implicate the policies of tort law. First, a court must consider whether the defective product could result in an

unreasonable risk of harm to person or property. Second, the court must decide whether the circumstances in which the defect became manifest were such that the defect actually resulted in the unreasonable risk. This second inquiry ensures that tort recovery is not available every time a defect that can generally be described as safety-related becomes manifest. Under my approach, a line is drawn between cases in which the damage to the defective product occurs in circumstances that do not create risk and cases in which the damage occurs in circumstances that do create risk. The importance of these two considerations is, in fact, suggested by the court's statement in *PGS* that "the nature of the defect and the type of risk it poses are the guiding factors" in the analysis. 652 F.2d at 1174.

Notwithstanding the foregoing analysis, I readily concede that this is a very close case and that the proposition that East River should be permitted to pursue tort recovery as to count I is not free from doubt. Although the majority would deny tort recovery based on the *PGS* test, I believe that a stronger argument against recovery is that *PGS* was simply not intended to apply to cases in which the damage to the defective product itself was not causally related to the violent collision or calamitous event during which the defect in the product became manifest. *PGS* did not have to reach this issue because additional damage to the front-loader was caused by the fire as a result of the absence of a sprinkler system.[7] In

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7. The cases that *PGS* relied on also evidenced this causal relationship between the damage to the defective product and the calamitous event. In *Seely*, *supra*, the damage to the truck was caused by the accident that resulted from the brake failure. In Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977), additional damage to the mobile home was caused by the fire because the carpet was made of flammable material.

this case, however, no additional damage to the turbine resulted from the storm at sea as a result of the defect: the damage to the turbine apparently would have occurred to precisely the same extent regardless of the storm at sea. A requirement that the external hazard result in actual damage to the defective product would not doubt be a principled limit on the availability of tort recovery when there is damage only to the defective product. I would reject such a limitation, however, because to read *PGS* as establishing a bar against recovery in such "near miss" cases would disserve the principles of tort law that motivated the decision.[8]

In sum, the majority's decision about the general applicability of tort law principles in admiralty is correct. The majority errs, however, in its application of the *PGS* factors to the allegations in this case. In my view, the charterers' evidence concerning the STUYVESANT incident raises a genuine issue of material fact concerning the risk to the STUYVESANT as a result of the defective turbine. I believe that the affidavits at least present a triable issue as to whether the increased risk to the STUYVESANT which resulted from the defective turbine was significant enough to be characterized as "unreasonable," and whether harm was imminent. I would therefore remand for a judicial determination as to

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8. As the discussion in the text indicates, I believe that *PGS* should apply to a case involving a "near miss" or "imminent risk of harm." I believe that even if this result represents an extension of the *Seely/PGS* doctrine, it is a principled and proper extension as well as a minimal one. *See PGS*, 652 F.2d at 1169 ("The gist of a products liability tort case is not that the plaintiff failed to receive the quality of product he expected, but that the plaintiff has been *exposed, through a hazardous product, to an unreasonable risk* of injury to his person or his property." (emphasis added)).

I also recognize that this is not a sympathetic case for allowing recovery because the parties are large corporations who were fully able to protect their respective interests at the time of the purchase of

whether the loss of speed attributable to the turbine's breakdown significantly increased the risk created by the stormy seas of the Gulf of Alaska. If it did not, the plaintiffs as a matter of law cannot recover their economic loss in tort.[9] If, however, the plaintiffs can succeed in proving that the turbine's breakdown did cause an unreasonable risk, they are, under my view of the case, entitled to damages for economic loss, given the fact that the PGS test is otherwise met.

Judge Higginbotham joins in this opinion.

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Clerk of the United States Court of Appeals
for the Third Circuit

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the turbine. I note in this regard that the status of the parties is simply not relevant to the *PGS* analysis adopted by the majority. Perhaps, however, the solution in this regard is that commercial purchasers should be able to waive tort liability for damage to property. *Cf.* U.C.C. § 2-719(3) ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable"). Judge Higginbotham believes that tort liability for economic loss can be waived by a commercial purchaser in an admiralty case.

9. The plaintiff bears the burden of showing that a defect creates an unreasonable risk of harm. In this regard the plaintiff must show that the risk of harm involved was a result of product defect—the standard causation question—and that it was unreasonable. This will require a plaintiff to carry the substantial burden of showing that there was an unreasonable risk in spite of the fact that no actual harm ensued. Although meeting this burden may be particularly difficult where, as here, the danger was created by an extrinsic source and the product defect allegedly enhanced the existing danger, the plaintiff, in my view, should have an opportunity to present the evidence to a fact-finder.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5192

EAST RIVER STEAMSHIP CORP.,
A NEW YORK CORPORATION;
KINGSWAY TANKERS, INC.,
A NEW YORK CORPORATION;
QUEENSWAY TANKERS, INC.,
A DELAWARE CORPORATION;
RICHMOND TANKERS, INC.,
A DELAWARE CORPORATION;

Appellants

v.

DELAVAL TURBINE, INC., now known as
TRANSAMERICA DELAVAL INC., A DELWARE
CORPORATION,

Appellee

PRESENT: SEITZ, *Chief Judge*, ALDISERT, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and BECKER, *Circuit Judges*.

ORDER

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

ORDERED that the Clerk of this Court list the above case for rehearing before the court in banc at the convenience of the Court.

BY THE COURT,

/s/ Collins J. Seitz

Dated: June 8, 1984 Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5192

EAST RIVER STEAMSHIP CORP.,
A NEW YORK CORPORATION;
KINGSWAY TANKERS, INC.,
A NEW YORK CORPORATION;
QUEENSWAY TANKERS, INC.,
A DELAWARE CORPORATION;
RICHMOND TANKERS, INC.,
A DELAWARE CORPORATION

Appellants

vs.

DELAVAL TURBINE, INC., now known as
TRANSAMERICA DELAVAL INC., A DELAWARE
CORPORATION

Appellees

On Appeal From the United States District Court
For the District of New Jersey
D.C. Civil No. 80-0238

Present: ALDISERT, *Chief Judge*, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and BECKER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New

Jersey and was argued by counsel November 18, 1983 and reargued before the Court in banc on November 13, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered January 25, 1983, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:
/s/ Sally Mrvos
Clerk

January 16, 1985

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Appellants

VS.

DELAVAL TURBINE, INC., now known as
TRANSAMERICA DELAVAL INC., A DELAWARE
CORPORATION

Appellees

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and BECKER, *Circuit Judges*

The petition for rehearing filed by

APPELLANTS

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ James Hunter, III
Judge

Dated: Feb. 13, 1985

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SEATRAIN LINES, INC., et al.,
Plaintiffs,
v. CIVIL ACTION
NO. 80-238

DELAVAL TURBINE, INC., etc.,
Defendant.

OPINION

Appearances:

Thomas E. Durkin, Jr., Esq.
James T. Owens, Esq.
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BY: Waldron Kraemer, Esq.
and
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BY: Normal L. Greene, Esq.
Robert E. Smith, Esq.
(New York Bar)
Attorneys for Defendant.

MEANOR, District Judge.

This admiralty case in tort stems from a dispute as to the quality and functionality of marine power turbines constructed by the defendant Transamerica Delaval, Inc. (Delaval). These turbines were installed on four ships ultimately chartered by the plaintiffs, Queensway Tankers, Inc. (Queensway). Kingsway Tankers, Inc. (Kingsway), East River Steamship Corp. (East River), and Richmond Tankers, Inc. (Richmond). Plaintiffs allege that, due to the defects in their design and construc-

tion, the turbines in one case failed and in all cases required extensive repairs during which the ships were inoperable and profits consequently lost.

Presently before the court is Delaval's motion for summary judgment, predicated on a variety of grounds. Principal among these are defendant's contentions that purely economic losses are not recoverable in a tort action and that a strict liability cause of action should not be allowed as between two commercial entities. Delaval's motion thus squarely presents for the court's consideration a number of uncertain questions of admiralty law. Both parties have ably briefed the issues and have in addition supplied voluminous materials outside the pleadings. After carefully reviewing all the submissions and mindful that it is determining novel or nearly novel questions of maritime tort law, this court finds that, for the reasons which follow, summary judgment must be granted in favor of defendant on the first Four Counts of the Second Amended Complaint

I

BACKGROUND

This lawsuit has its genesis in a 1969 announcement by Shipbuilding Corporation, a wholly-owned Delaware subsidiary of Seatrain Lines, Inc., also a Delaware corporation, that it would construct five 225,000 ton supertankers at its Brooklyn, New York facilities. Delaval (then Delaval Turbine, Inc.) offered to design, manufacture, construct, and supervise the installation of turbine units for these supertankers. The turbines were to serve as the power plants for the vessels. According to plaintiffs, Delaval represented that it was competent to perform these tasks. Plaintiffs further allege that such repre-

sentations induced Shipbuilding to contract with Delaval for the turbines. Delaval ultimately provided turbines for the four ships at issue and supervised their installation.

The four ships in issue here are the S.S. Stuyvesant, the S.S. Williamsburgh, the S.S. Brooklyn, and the S.S. Bay Ridge. All were constructed by Shipbuilding, each under contract with a separate wholly-owned subsidiary of Seatrain. These contracting subsidiaries then transferred title to the ships to either the U.S. Trust Company or the Wilmington Trust Company. Those two owners in turn chartered the vessels to the instant plaintiffs, also subsidiaries of Seatrain, as follows: Queensway chartered the Stuyvesant; Kingsway, the Williamsburgh; East River, the Brooklyn; Richmond, the Bay Ridge. Seatrain guaranteed the performance of all four charterer plaintiffs.[1]

The first of the ships involved in this suit, the Stuyvesant, was completed on or about July 1, 1977. Title to the vessel was transferred to the U.S. Trust Company on August 15, 1977, the same date that Queensway entered into a 20-year charter for the Stuyvesant. Thereafter, Queensway entered into a time charter with SO Ohio.

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1. The chart below summarizes the relation of the parties with respect to each tanker:

	S.S. STUYVESANT	S.S. WILLIAMSBURGH	S.S. BROOKLYN	S.S. BAY RIDGE
Builder	Shipbuilding	Shipbuilding	Shipbuilding	Shipbuilding
Subsidiary Plaintiff	Polk	Tyler	Langfitt	Fillmore
Owner	U.S. Trust Company as Trustee for General Electric Credit Corporation ("GECC")	Wilmington Trust Co. as Trustee for GECC	Wilmington Trust Co. as Trustee for GECC	U.S. Trust Company as Trustee for Security Pacific Bank and American Road Equipment Corporation
Charterer	Queensway	Kingsway	East River	Richmond
Guarantor	Seatrain	Seatrain	Seatrain	Seatrain

The ship sailed at the end of July 1977. On December 11, 1977 the Stuyvesant was in operation and about to enter the Port of Valdez, Alaska, when a loud noise was heard in its engine room. Investigation revealed that steam was issuing from the junction of the steam inlet central valve chest and the high pressure turbine casing. Temporary repairs were effected in Valdez and the ship, loaded with cargo, set sail for its destination, Parita Bay, Panama. A subsequent malfunction of the Stuyvesant's high pressure turbine prevented the ship from proceeding at a normal sea speed, although the vessel did reach its intended port. Upon a subsequent arrival at San Francisco on January 27, 1978, the turbine was opened up and examined. The inspection revealed heavy damage to the rotor, thrust, and internal stationary parts of the high pressure turbine the cause of which was unascertainable at the time. The damaged parts were replaced with similar elements taken from the Bay Ridge, then under construction by Seatrain. Upon completion of these repairs, the Stuyvesant was operational and resumed its travels. In April 1978, the Stuyvesant again docked in San Francisco. At that time, the replacement parts installed in early 1978—which had deteriorated—were themselves replaced with similar parts taken from the Brooklyn to serve as a temporary repair for the Stuyvesant. Finally, in San Francisco in August 1978, the Stuyvesant received as a final repair parts newly designed and manufactured by Delaval which apparently cured the defects in the ship's performance.

As a result of the problems encountered with the Stuyvesant, Seatrain inspected the turbines of both the Brooklyn and the Williamsburgh in March 1978. The Brooklyn, completed in late 1973, exhibited the same type of damage to its high pressure turbine as did the Stuyvesant. The defective high pressure turbine part removed from the Stuyvesant in April 1978, repaired and

strengthened under defendant's auspices, was installed in the Brooklyn in June 1978 as a temporary repair. In August 1978, a part newly designed and built by Delaval was placed in the Brooklyn as a final repair. Additionally, East River claims that repairs and replacement parts were required for the Brooklyn's low pressure turbine.

The Williamsburgh was completed in December 1978. Examination of the Williamsburgh revealed the same type of damage to its high pressure turbines as was found in the other two ships. During late March and early April 1978, the defective high pressure part causing the problem was repaired and replaced in the Williamsburgh under Delaval's supervision. Between late July and late September 1978, the defective part was replaced with one newly designed and built by Delaval. Certain other repairs required by the high pressure and low pressure turbines were performed at that time; the remainder of the required repairs were undertaken from December 8, 1979 through January 24, 1980.

The last ship involved here, the Bay Ridge, allegedly suffered deterioration of its high pressure turbine, Count 4, although the complaint's factual allegations as to this claim are virtually non-existent. Plaintiff Richmond also claims that on March 13, 1980 while the Bay Ridge was at sea, its low pressure turbine sustained damage necessitating a reduction in speed and repairs at a port of refuge. This low pressure turbine damage was allegedly caused by the installation in reverse of an astern guardian valve which allowed steam to enter the low pressure turbine. Proper installation of this valve was, Richmond asserts, the responsibility of Delaval.[2]

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2. It appears that the Second Amended Complaint makes broad allegations that the low pressure turbines on all the ships were also defective.

As to each ship, the various plaintiffs sue for the recovery of repair costs as well as the loss of income resulting from the down time of these ships during their repairs.

II

At the heart of this summary judgment motion is the question whether the type of injury sustained by plaintiffs is of a variety cognizable in tort. Plaintiffs seek recovery for the repair costs and loss of income attendant to the turbine difficulties. This type of loss is generally referred to as economic loss.

Courts have disagreed sharply as to the circumstances under which such economic loss is recoverable in tort. As was pointed out in recent Third Circuit decisions, the large majority of courts facing this question have held that economic loss caused by qualitative defects, (*i.e.*, those stemming from the poor quality of a product and its failure to perform as expected) does not fall within the ambit of tort. *Pennsylvania Glass Sand v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1169-71 & n.17 (3d Cir. 1981) (hereinafter "*PGS*"); *Jones & Laughlin Steel Corporation v. Johns-Manville Sales Corp.*, 626 F.2d 280, 285-87 & n.13 (3d Cir. 1980). The majority view requires that the economic loss stem from defects causing or posing an unreasonable risk to people or property. New Jersey, the forum state here, falls into the minority camp allowing tort recovery for economic loss regardless of the nature of the defect. Indeed, the minority view has its genesis in the New Jersey case of *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52 (1965) in which tort recovery was allowed for aesthetic defects in carpeting.

Naturally, the parties here disagree as to which law should be applied and as to the nature of defect which caused the instant loss. Plaintiffs contend that the New

Jersey minority rule should apply and that in any event the defect was one which posed an unreasonable risk of harm to the ships and their crews. Defendant maintains that the majority rule is apposite and that the defects of the turbines were qualitative in nature. This court thus faces three questions en route to its final result: (1) which general rule of tort law to apply, (2) what are the exact boundaries of that law as applied, and (3) whether the circumstances of these turbines' failure fall within those boundaries of tort recovery. These questions will be considered in turn.

(1) *Admiralty Law and Tort Recovery.*

Determining which rule of tort law to apply in this case necessitates a descent into the turbid waters of admiralty choice of law. Specifically, this court must decide whether substantive admiralty would adopt the rule of the court's locale or such state as has the greatest connection with the cause of action or rather would adopt the rule most widely accepted by the common law. Answering this question in turn requires examination of the considerations which have guided past courts in resolving similar problems.

At the outset, it should be noted that this case does not, at least with regard to the strict liability allegations, involve the question of whether admiralty law should adopt a particular state's substantive law where admiralty law has not addressed the question. Numerous cases make clear that in the eyes of admiralty law, the concepts of strict liability have been sufficiently widely accepted on land to be incorporated into the admiralty law. *See, e.g., Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129, 1134-35 (9th Cir. 1978); *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 636-37 (8th Cir. 1972). The ques-

tion rather pertains solely to the recoverability of economic loss (*i.e.*, repairs, cost of replacement, lost profits) where it stems solely from qualitative defects. Prior admiralty cases instruct that it is the *prevailing* law of the land which should be adopted. *Pan-Alaska*, 565 F.2d at 1134-35; *Lindsay*, 460 F.2d at 636; *Igneri v. CIE. de Transports Oceaniques*, 323 F.2d 257, 259 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964). In this case, it is clear that the prevailing rule of law on the land is that which denies recovery for liability resulting from qualitative defects in goods. *See PGS*, 652 F.2d at 1170-71. At lease one admiralty court, faced with the instant question, has adopted the majority rule as substantive admiralty law. *Maru Shipping Co., Inc. v. Burmeister & Wain American Corp.*, 528 F.Supp. 210, 214-15 (S.D.N.Y. 1981). In so doing, the *Maru* court relied on the cases advocating adoption of prevailing rules in such cases and upon its own analysis of the purposes and bases of tort recovery. Apparently, the *Maru* court did not face the claim, advanced here, that local law should apply because admiralty law had not answered the precise question at issue. To the extent that the above-cited case law requiring adoption of the prevailing land law does not answer plaintiffs' argument, this court will examine their position on its own terms.

In support of the contention that New Jersey strict liability principles should apply in this suit, plaintiffs cite cases asserting the abstract principle that state law may supplement maritime law where it is not in conflict with federal maritime law. In particular, plaintiffs quote at length from *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) to the effect that states retain the power to address a wide range of activities which may fall within the reach of maritime law.[3] *Ro-*

3. It should be noted that *Romero* actually discussed the issue in the context of whether maritime law consisted of federal law for purposes of federal question jurisdiction. It was in answering this question in the negative that the *Romero* court noted that state law is often enforced in admiralty. Thus, *Romero* did not present a concrete example or instance of the application *vel non* of state law.

mero is further cited for the proposition that much regulatory power over maritime torts has been left with the states. *Id.* at 373. Other cases referred to by plaintiff are much to the same effect.[4]

The principle advanced by plaintiffs that the mere existence of federal maritime law does not in all cases automatically preclude the application of state law is of itself both indisputable and unexceptional. Plaintiffs thus show that, in at least some circumstances, state law may be enforced by an admiralty court. What plaintiffs fail to advance, however, is any rationale for why such enforcement is *mandatory* or even desirable in this case. Plaintiffs do not attempt to distill from the factual settings in which enforcement of state law has been allowed any principle or rule for determining when such local law enforcement should or must be allowed. This failure is understandable, given the disharmony, if not outright inconsistencies of Supreme Court opinions in this area. Indeed, that Court itself has apparently studiously avoided providing firm guidelines in this field. There accordingly falls upon this court the task of abstracting some guiding rule in deciding when local law should prevail.[5]

Examination of the cases cited by plaintiffs as well as others reveals that the single most crucial factor appears

4. *See, e.g., Askew v. American Waterways Operators*, 411 U.S. 325 (1973).

5. In attempting this task, this court must disclaim any pretense of a comprehensive analysis of the whole of admiralty law or even of every relevant choice of law case. Rather, by tracing the broad outline of maritime choice of law, it will merely seek to establish an analytical framework identifying the factors which may be utilized in determining the content of admiralty law in the instant case.

to be the degree of connection between the cause of action and the state. Where a cause of action arises from an event taking place within a state's territorial waters and is essentially of local interest, courts have been inclined to apply state law. Thus, in *Just v. Chambers*, 312 U.S. 383 (1941) plaintiffs were injured while aboard decedents' pleasure boat. They sued the decedents' estate under a Florida statute enabling them to do so. Defendant asserted that allowing recovery against the estate violated an alleged admiralty rule that causes of action for personal injury die with the person. *Id.* at 387. Before the Supreme Court was thus the question whether this admiralty rule precluded application of this Florida statute and consequently maintenance of the suit. Without specifically passing on the accuracy of defendant's characterization of the admiralty law in this regard, the Court held that enforcement of the state statute was not preempted by federal maritime law. In so holding, the Court apparently relied on the fact that the mishap occurred within Florida's territorial waters. *Id.* at 387-89, 391. Additionally, the Court noted that the statute at issue was an exercise of the state's police powers within its own territory, an exercise to be broadly recognized. *Id.* at 389, 391.

In *Wilburn Boat Co. v. Fireman's Insurance Co.*, 348 U.S. 310 (1955), plaintiff owned a small houseboat with which they carried passengers commercially on an artificial inland lake between Texas and Oklahoma. The boat was destroyed by a fire which also ignited a contract dispute between plaintiffs and their insurer. The case turned upon the applicability *vel non* of statutory Texas insurance contract law. After noting that the federal government had left much regulatory power in the states in the area of maritime contracts as well as maritime tort, the Court determined that neither Congress nor any of its prior decisions had established a federal admiralty

rule on the subject. 348 U.S. at 313-16. Faced as a result with a choice between fashioning a federal rule on the subject and adopting Texas law, the Court opted for the latter. The *Wilburn* Court justified its decision by adverting to the deference Congress and the courts have traditionally accorded states in the insurance field. *Id.* at 316-21. Although the contract at issue clearly fell within federal admiralty jurisdiction because it involved a maritime contract, the Court stated that it would not attempt to fashion a rule of maritime insurance law since even Congress, which was much better suited to this task, had declined it. *Id.* at 316-19. The complexities and policy questions inherent in the establishment or unification of maritime insurance presented too difficult an endeavor for courts; these questions rather were fit for Congress. *Id.* at 319-21. In light of these considerations the Court determined to join Congress in its traditional caution about tampering with the diverse system of state regulation. *Id.* at 320-21.

Justice Frankfurter concurred in the result but would have based the decision on the extremely local nature of the transaction and situation involved there. *Id.* at 321-22. Application of Texas law was in this case appropriate since the interests involved in the national and international phases of shipping were uninterested in "such limited situations." *Id.* at 322. Justice Frankfurter expressed his concern, however, that the Court's decision not lead to such anomalous results as the subjection of ocean-going vessels to the local law of the various ports upon which it called. *Id.* at 323. Justice Frankfurter went on to state that:

> As is true of other maritime interests, however, the demand for uniformity is not inflexible and does not preclude the balancing of the competing claims of state, national and international interests. The

process and some of the relevant considerations here are not unlike those involved when the question is whether a State, in the absence of congressional action, may regulate some matters even though aspects of interstate commerce are affected. In rejecting abdication of all responsibility by this Court for uniformities in maritime insurance and its complete surrender to the States, one is not required to embrace another absolute, complete absorption by this Court of the field of marine insurance and entire exclusion of the States. It is not necessary to assert that uniformity, if it be required in any case, is required in all cases cognizable in admiralty—whether the craft was for business or pleasure, touched in five states, five nations or never left the confines of an inland lake. The deceptive lure of certainty and comprehensive symmetry should not be permitted to conceal the fact that admiralty's expansion beyond "the ebb and flow of the tides" has been a response to demands more inclusive than those for mechanical uniformity.

> Under the distribution of power between national authority and local law, admiralty has developed for more than a hundred years by rulings of the Court, but not by absolutes either of abstention or extension.

Id. at 323-324.

Yet another case cited by plaintiff, *The Hamilton*, 207 U.S. 398 (1907), turns on the peculiarly local interest inherent in the situation before that Court. Before the 1920 enactment of the Death on the High Seas Act, 46 U.S.C. §§761-768 (1975), there was no maritime right of action for wrongful death. In *The Hamilton*, Delaware by statute provided such recovery in general. Two ships owned by Delaware corporations collided on the high

seas with attendant loss of life on the part of Delaware citizens aboard one of the ships. Suit was instituted under the Delaware statute; since admiralty law did not provide recovery for maritime wrongful death, it was argued that a state had no authority to do so and thereby alter admiralty law. *The Hamilton* Court rejected this argument, holding that the saving to suitors clause left the common law with jurisdiction over torts at sea. 207 U.S. at 404. By analogy to the acknowledged role of federal court admiralty jurisdiction as a source of Congressional power in this area, the "saving to suitors" clause grant of common law jurisdiction over maritime torts serves as a basis for state legislative power in the same field. *Id.* Thus, the same reasoning which imbues Congress with its power to act confers power on state legislatures when Congress has *not* acted. *Id.* The Court then held that a vessel at sea is part of the territory of a state and thus that state's law is applicable to it. *Id.* at 405. Accordingly, the Court held that the Delaware statute reached as far as the two Delaware ships at sea and provided recovery for the death of the Delaware citizens. *Id.* at 405. It should be noted, however, that the Court's decision was apparently based upon the nature of all parties as Delaware citizens. Indeed, the Court specifically pointed out that its decision did not answer the question whether Delaware owners of vessels were similarly liable to plaintiffs who were foreign subjects. *Id.* at 405.

Another Supreme Court decision bears mentioning. In the fairly recent case of *Askew v. American Waterways Operators*, 411 U.S. 325 (1973), the Court had before it a Florida statute which, *inter alia*, imposed strict liability for damages suffered as a result of an oil spill in Florida territorial waters. Similar federal legislation comprised "a pervasive system of federal control over discharges of oil" in or on United States navigable waters, or contigu-

ous zone waters as well as the adjoining shorelines. 411 U.S. at 330. After finding that the Florida statute neither was preempted nor was in impermissible conflict with the federal provision, the Court faced the issue of whether "a State constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government." *Id.* at 337. Answering this question affirmatively, the Court relied upon case law holding that state exercise of police power within its territory was permissible where such exercise was for the local good and did not interfere with the intended effect of federal maritime rule. *Id.* at 340-44. Indeed, the Court pointed out that the regulation of the shoreline was historically within the police power of the State, and without the reach of admiralty. *Id.* Only via the Admiralty Extension Act of 1948, 46 U.S.C. § 740, did Congress extend admiralty jurisdiction to the shore. *Id.* at 340-41. Given the long-standing competency of the states in this area the Court found that the Admiralty Extension Act did not divest the states of their concurrent authority in this area, particularly since the Act did not purport to provide an exclusive remedy. *Id.* at 341-44. This conclusion was said to follow from cases allowing state police power regulation precisely because such regulation was directed at local problems and was intended to secure the health and promote the cleanliness of the local community. *Id.*

Not all Supreme Court admiralty cases involving maritime torts in local waters have been adjudicated on the basis of state law. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), plaintiff had been injured while doing carpentry work on a ship moored in Pennsylvania waters. Defendants alleged that Pennsylvania's law of contributory negligence which would have barred plaintiff's claim was applicable. In rejecting their contention, the Court noted that while it was true that ordinarily plaintiff's rights would be determined by Pennsylvania law since the accident occurred in Pennslyvania, nevertheless it took place while plaintiff was working on a ship to enable it to finish loading for safer transportation of its cargo. 346 U.S. at 409. As a result, the basis of plaintiff's suit was a maritime suit, the substantive and procedural elements of which the Constitution had placed under national control. Plaintiff did not rely on Pennsylvania law in his claim; rather, it was based entirely on federal maritime law. *Id.* The Court went on to state that even if plaintiff was attempting to enforce a state-created remedy for his right of recovery, federal maritime law would control. *Id.* Although state law may occasionally supplement federal maritime policies, a state may not deprive a person of any substantial ordinary rights which have been Congressionally or judicially created. *Id.* at 409-410.

Similarly, in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), plaintiff was a visitor to a vessel moored in New York waters who suffered injuries, allegedly due to the unseaworthiness of the ship and its crew's negligence. Although the case was brought in diversity, the Court held that the district court had erred in applying substantive New York law; since the injury took place aboard a ship in navigable waters, the case fell within admiralty jurisdiction and maritime law applied. 358 U.S. at 628. Recovery in the case turned on the duty of care owed by a shipowner to a social visitor such as plaintiff. *Id.* at 629-30. New York law recognized a distinction in the duty of care owed a licensee as opposed to an invitee; thus, the ultimate issue was whether admiralty would recognize that same distinction. *Id.* In answering this question in the negative, the *Kermarac* Court first noted that it had not previously decided whether a shipowner owed a lesser duty of care to one who could be classed as a licensee. *Id.* at 630. Although

admiralty law was then silent up to that point regarding this question, the Court did not simply adopt the New York common law. Rather it forthrightly stated that "The issue must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common law concepts." *Id.* The Court then went on to reject the New York duty of care distinction. In so doing it relied on the grounds that the trend of the common law was away from such distinctions and toward a single duty of reasonable care, that the fine distinctions at issue were foreign to admiralty law's traditions of "simplicity and practicability", and that admiralty's adoption of such distinctions was especially inappropriate insofar as the distinctions arose in the context of a legal system founded upon an individual's estate with regard to real property. *Id.* at 630-32. Thus, the *Kermarec* Court clearly saw its task as that of deciding, in light of all the circumstances, whether to adopt a common law precept in the absence of an admiralty rule.

The Supreme Court's most recent expression on the ambit of admiralty jurisdiction is contained in *Foremost Insurance Co. v. Richardson*, _____U.S. _____ (June 23, 1982). There two purely pleasure boats collided on navigable river waters. The district court rejected admiralty jurisdiction in an action to recover damages for wrongful death arising out of the collision. It reasoned, in reliance upon *Executive Jet Aviation v. Cleveland*, 409 U.S. 249 (1972), that there was insufficient nexus between the collision of two purely recreational pleasure boats and traditional maritime concerns to support admiralty jurisdiction.[5a] The Court of Appeals reversed,

5a. In *Executive Jet* an aircraft taking off for a destination in the United States encountered a flock of seagulls as it ascended. The gulls were sucked into the engine of the aircraft and caused a loss of power which led to the sinking of the aircraft in Lake Erie only a short distance from shore. The Court held that "there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States." 409 U.S. at 274.

Richardson v. Foremost Insurance Co., 641 F.2d 314 (5th Cir. 1981), and the Supreme Court affirmed. It held, 5-4, in light of the necessity for uniform rules of navigation, that the action before it was properly a subject of admiralty jurisdiction, despite the complete absence of any commercial activity involving the colliding craft.

Note should also be taken of lower federal court decisions concerning the sources of admiralty law. In *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974), plaintiff sued as a consequence of injuries sustained while a social guest on a small pleasure boat plying a navigable stream in Arkansas. That state had a boat guest statute limiting recovery for injuries sustained while a social guest on a motorboat. The Eighth Circuit held that admiralty forbade the application of the Arkansas statute. It reached this result, *inter alia*, on the ground that enforcement of the statute would contravene the necessary uniformity of the admiralty law since Arkansas was the only state with such a statute. 496 F.2d at 981. Thus, only within Arkansas would this rule function to defeat a plaintiff's rights; such a local restriction was not permissible "in light of the need for a uniform and harmonious maritime law." *Id.*

The Second Circuit in *In re M/T Alva Cape*, 405 F.2d 962 (2d Cir. 1969) outlined some of the considerations influencing the choice of law in an admiralty case. In *Alva Cape*, there was a claim in admiralty against the City of New York for a tort allegedly caused by the City

in its own waters. The suit posed the question whether the admiralty court should apply state law in adjudicating the City's liability or else apply or fashion a maritime rule of law due to a demonstrated need for uniformity in the relevant law in all admiralty suits on this subject. 405 F.2d at 969. The court stated that such an inquiry would be unnecessary if the New York law in question broadened the recovery available in admiralty. *Id.* at 969-70. It noted, however, the possibility that application of the local law might limit recovery otherwise obtainable in admiralty. *Id.* at 970. In that case, whether New York law should apply would turn on factors not considered by the district court. *Id.* Thus, the Second Circuit remanded without deciding the issue. *Id.* at 971, although it did discuss some of the factors it believed necessary to the issue's resolution. That discussion has significance in the instant case even though the Second Circuit appeared to make the issue turn initially on whether the local rule would expand or contract maritime recovery. This follows from the *Alva Cape* court's explicit holding that even if there had been up to that point no maritime rule in the relevant area (there, governmental immunity), inquiry would still have to be made as to the propriety of applying local law. *Id.* at 970. Thus, inquiry must be undertaken even where it is not clear (because of the lack of relevant maritime law) whether local law would indeed limit recovery in admiralty. In such cases, as in the case *sub judice*, there remains the independent issue whether a state law may "so disrupt the uniformity of the admiralty law in some crucial respect that it must be deemed preempted" even if the local law does not contradict a settled admiralty law principle. *Id.* at 970. Accordingly, the factors canvassed in *Alva Cape* are relevant to the inquiry before this court.

In *Alva Cape*, this preemption inquiry would focus on the need for a uniform maritime rule granting recovery

for negligently caused damages in contrast to the various limitations on tort liabilities of cities of the several states. *Id.* at 970-71. The need for uniformity must be considered in "specific terms, and not in an abstract aesthetic sense." *Id.* at 971. Some factors include the state interest in limiting the liability of financially pressed cities and the federal concern for the protection of maritime rights, particularly where, as in the field of governmental immunity, states may not be truly neutral in their handling of such rights. *Id.*

A case illustrating the principle elucidated in Justice Frankfurter's concurrence in *Wilburn* that local law may be applied where the tort is of an extremely localized nature is *Baggett v. Richardson*, 473 F.2d 863 (5th Cir. 1973). In *Baggett*, plaintiff was injured in a fight which occurred aboard a tug moored in New Orleans waters. Although the Fifth Circuit deemed the fight a maritime tort because it occurred aboard a tug, in all other respects it was a Louisiana tort claim. 473 F.2d at 864. Given the circumstances, application of Louisiana tort law was proper under the general rule that maritime law courts may adopt state law by express or implied reference or because of "the interstitial nature of federal law." *Id.* Relatedly, another Fifth Circuit case has explicitly stated that the question in choosing the applicable law in a concededly maritime suit is simply "is the particular issue to be resolved of such a local nature that state law should be applied?" *Alcoa Steamship Co. v. Charles Ferran & Co.*, 383 F.2d 46, 50 (5th Cir. 1967), *cert. denied*, 393 U.S. 836 (1968) (allowing state direct action statute to be utilized against an insurer in a maritime contract action.)

Finally, in *Igneri v. CIE. de Transports Oceaniques*, 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964), the court faced the novel admiralty issue whether

a longshoreman's wife could recover for loss of consortium due to injuries sustained in New York waters caused by a shipowner's negligence or the unseaworthiness of the ship. 323 F.2d at 258. In deciding what law to apply to this issue, the court first noted that, inasmuch as the case was governed by admiralty law, New York law denying recovery for loss of consortium could not serve to defeat a maritime claim. *Id.* at 259. Although New York law would not be decisive, nevertheless the common law could have some relevance:

> Maritime law draws on many sources; when there are no clear precedents in the law of the sea, admiralty judges often look to the law prevailing on the land. At least this much is true. If the common law recognized a wife's claim for loss of consortium uniformly or nearly so, a United States admiralty court would approach the problem here by asking itself why it should not likewise do so; if the common law denied such a claim, uniformly or nearly so, the inquiry would be whether there was sufficient reason for an admiralty court's nevertheless recognizing one. (Citations omitted.)

Id. at 259-60. In *Igneri*, examination of the prevailing common law revealed nearly equal numbers of jurisdictions coming down on each side of the question and the opposing arguments in near equilibrium. *Id.* at 260-61, 265.[6] This being the case, the Second Circuit refused to

6. The court went on to consider which result comported better with other relevant maritime law factors. *Id.* at 265. When general maritime precedents proved inconclusive, the court finally fashioned a rule denying recovery by analogy to the Jones Act which similarly denied recovery for loss of consortium to seamen's wives. *Id.* at 266. Finding no reason to support an inference that Congress, having rejected recovery for one would want a judicially fashioned recovery for the other, the *Igneri* court adopted as admiralty law a rule denying damages for loss of consortium on the part of a longshoreman's wife. *Id.* at 267. Since the common law did not clearly authorize a wife's recovery and since maritime law generally did not allow a claim for negligent injury to such an intangible right, the analogy to a seaman's wife's position was irresistible. *Id.* This was especially true in light of the court's self-identified duty to "avoid capricious differences in treatment between similarly situated people". *Id.*

adopt either common law position as determinitive but rather turned to a search for other admiralty cases dealing with recovery of such intangible rights.

What emerges from these cases is, if not a comprehensive scheme of choice of law in admiralty cases, at least a collection of guiding principles. Thus, as *Kermarec* and *Alva Cape* make clear, the mere absence of a maritime rule of law on the relevant issue does not necessitate the court's slavish adoption of the forum state's law. Federal admiralty courts, including this one, remain free to declare the general maritime law as they see fit and to reject applicable local law where reasoned analysis demonstrates its incompatibility with general maritime principles or with a necessary uniformity in a given sphere of admiralty law.[7]

7. Perhaps nowhere is the flexibility of federal admiralty courts more graphically demonstrated than in the transition from *The Hamilton* to *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). In the former, state law causes of action for wrongful death were enforced in admiralty because the Supreme Court had held in *The Harrisburg*, 119 U.S. 199 (1886) that general maritime law provided no cause of action for wrongful death. Thus, enforcement of state wrongful death laws did not conflict with admiralty law and such enforcement was sanctioned by federal admiralty courts. In *Moragne*, however, the Supreme Court explicitly overruled *The Harrisburg* and created a wrongful death remedy, under the general maritime law. In so doing, it apparently precluded the applicability of state wrongful death causes of action. *See Moragne*, 398 U.S. at 401-02 & n.15. The *Moragne* court thus chose to create and enforce a single right under federal *maritime* law rather than continue to enforce diverse *state* remedies with admiralty law's acquiescence. Accordingly, it is clear that an admiralty court is not bound to apply state law allowing for recovery in the absence of maritime law.

The foregoing examination of admiralty case law also highlights a crucial distinction overlooked by plaintiffs in their reliance on cases permitting enforcement of state laws. On the one hand is the mere application in an admiralty case of a particular state law to a particular set of circumstances which triggered the operation of that law. In contrast to this practice is the wholesale absorption by admiralty law of widely recognized causes of action as an integral part of the admiralty law, applicable in all cases. This distinction is illustrated, respectively, by *Wilburn* and *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977). In *Wilburn*, as previously noted, the Court focused on the longstanding tradition of federal noninterference in state insurance law to justify enforcement of Texas law in the case before it. In *Pan-Alaska*, by contrast, the question was whether strict liability in tort had been so widely accepted by the several states as to justify its being incorporated into federal maritime law. 565 F.2d at 1129. Once the court had decided that the theory was sufficiently widely accepted, the court adopted and applied it *not* as found in the forum state but rather in the "most widely-accepted expression of the theory," namely Section 402A of the Restatement (Second) of Torts. 565 F.2d at 1135. Thus, the most prevalent form of strict liability theory was accepted as the law of admiralty not just for the particular case before the *Pan-Alaska* court but for all strict liability cases arising in admiralty. *Id.* at 1134-35. Such an approach serves the admiralty goal of uniformity. *Id.*

As previously noted, strict liability is now generally deemed to be part of the admiralty law. Plaintiffs' citation of cases dealing with the applicability of individual state law is therefore inapposite. The standard for determining whether a given rule is part of admiralty strict liability theory should be the same as for incorporating

strict liability into admiralty in the first place—whether a clear majority of jurisdictions have adopted that particular rule. To hold that on the basis of its widespread acceptance, strict liability has become a part of the uniform admiralty law to be applied uniformly and then allow a major aspect of recovery under admiralty strict liability to turn on the fortuities of the forum state's law is an anomalous result indeed. Admiralty law has incorporated the general law of strict liability. To ascertain part of the content of that law by utilizing precepts designed for situations where admiralty is altogether silent is therefore inappropriate. Rather, this case is more akin to *Igneri* in which the Second Circuit refused to adopt either of two common law rules where neither had been chosen by a clear majority of jurisdictions. A similar approach of ascertaining and applying the majority common law rule will determine the outcome in the instant case.

Another aspect of admiralty choice of law apparent from the preceding case law survey is that admiralty adopts the law of the forum when there is a clear connection between the cause of action and the forum and the suit is generally of localized interest. Application of local law has thus been justified on the basis that the tort took place in local waters, especially where the local law is an exercise of the forum's police powers, as was the case in *Just*. The essentially localized effect and reach of state provisions designed to protect the citizens of the forum or the forum itself (*e.g.*, oil and smoke pollution statutes) has also justified enforcement in admiralty of forum law, as in *Askew*. Local law was also applied in *Baggett* where the location of the tort in state territorial waters provided the only maritime element to what was otherwise a completely state law tort. Forum law is applicable to mattes of traditionally great state interest, like insurance in *Wilburn*, as to which the federal government has

historically deferred to state control. Finally, state law has been applied in *The Hamilton* where although the tort occurred on the high seas and not within the forum's jurisdiction, the tort bore a close relation to the forum as all parties were citizens of that forum and the cause of action arose on ships owned by those citizens.[8]

One final theme surfacing from the riptides of admiralty choice of law cases is that courts faced with the issue of what law to apply engage essentially in a balancing inquiry. Many courts do not explicitly acknowledge utilizing balancing-type tests in determining whether general federal maritime law or local law will apply. That they are doing so is made clear, however, by noting the competing considerations they refer to in reaching their various results. Such factors generally bear on whether a cause of action is essentially localized and thus controlled by forum law and on whether an exercise of local authority was properly limited to protecting the local community rather than impermissibly impinging on matters of national or international concern. Case law treatment of a number of these factors has been previously discussed and need not be repeated here. The citation of these factors in the various admiralty decisions demonstrates judicial sensitivity to the competing interests they represent rather than the doctrinaire application of mechanical admiralty choice of law principles (which are difficult to isolate in any event.) The thesis that courts facing admiralty choice of law questions of necessity undertake a balancing analysis is also supported by those cases in which maritime courts have sanctioned

8. It should be remembered that in *The Hamilton*, admiralty did not provide the relief sought and the local law could be utilized. It should further be recalled that *The Hamilton* Court specifically limited its holding to facts before it, *i.e.*, where both plaintiffs and defendants were citizens of the forum, and expressly declined to state whether the same result would obtain if plaintiffs were not citizens of the forum state.

or openly engaged in such balancing. In *Romero*, for example, the Court expressed its concern that extending federal question jurisdiction to maritime cases would necessitate abstract jurisdictional determinations as to the state or federal source of the admiralty rule. 358 U.S. at 376. This in turn would "destroy that statutory flexibility which engages the courts to deal with source-of-law problems in light of the necessities illuminated by the particular question to be answered" which had allowed the Court "to deal with such conceptual problems in the context of a specific conflict and a specific application of policy . . . such practical considerations for adjudication would be unavailable under an expanded view of § 1331." *Id. See also Kossick v. United Fruit Co.*, 365 U.S. 731 (1961). That admiralty case concerned applicability of state law; determining the answer was a "process . . . of accommodation, entirely familiar in many areas of overlapping state and federal concerns, or a process somewhat analogous to the normal conflict of law situation where two sovereignties assert divergent interests in a transaction as to which both have some concern." 365 U.S. at 739. Thus, courts facing admiralty choice of law issues are charged with weighing the specific circumstances of each case as it arises. Additionally, as previously noted, the *Alva Cape* Court specifically instructed the district court on remand to examine the need for a uniform maritime rule of governmental immunity and for federal protection of maritime plaintiffs faced with such immunity while simultaneously giving recognition to the state interest in limiting liability of its financially strapped cities. 405 F.2d at 970-71. Support for a balancing approach to admiralty choice of law questions may also be found in Justice Frankfurter's concurrence in *Wilburn* explicitly advocating such an approach. Lastly, admiralty commentators have both discerned and approved a balancing process in this area of maritime law.

See Robertson, Admiralty and Federalism, 198-99, 266-68, 269-70.

With all of the foregoing factors or themes of admiralty choice of law in mind, this court will now turn to the case at hand.

Initially, this court believes that it possesses the power to determine admiralty law where it has yet to address an issue and need not merely adopt state law. Furthermore, as discussed above, admiralty law has spoken in this area at least to the extent of incorporating strict liability into federal maritime law as a rule of general applicability. In so doing, courts have adopted the most widely prevalent form of strict liability. In keeping with this practice, and because this court in deciding a maritime strict liability rule of law is determining the content of established federal maritime law, this court believes that the proper course is to adopt the most broadly accepted common law rule on point. As previously noted, this avoids the anomaly of admiralty's absorbing a general principle of common law precisely because it has ben so widely accepted and then defining the boundaries of that general principle by applying only the forum's law. Accordingly, this court adopts as the relevant admiralty law the majority common law view that damages for defects of quality are not recoverable in tort. *See PGS*, 652 F.2d at 1173; *Maru*, 528 F.2d at 215.

Even if the above reasoning did not resolve the issue, this court would reach the same result. Plaintiff has adduced no rationale for application of New Jersey law other than the alleged absence of an admiralty rule on point. Examination of the circumstances of the instant cause of action confirms that this case does not evince the characteristics generally associated with the application of forum law in admiralty. Thus, the place of the tort with regard to the Bay Ridge and Stuyvesant would be

the high seas upon which the turbine malfunctions occurred. As to the Brooklyn and Williamsburgh, the place of the tort would also apparently be the high seas where the damage was sustained or else the foreign ports in which it was discovered. Accordingly, none of the causes of action as to any of the vessels arose in New Jersey territorial waters. Nor are these vessels involved in essentially localized pursuits as was the houseboat in *Wilburn* which plied the waters of an artificial inland lake. Unlike *Baggett*, the admiralty location of the tort here is clearly not incidental to the cause of action; rather, the claim is itself intrinsically maritime.

Turning to those considerations favoring fashioning of a maritime rule as opposed to adoption of forum law, this court finds significant and decisive connections between this cause of action and the national and international interests embodied in federal admiralty jurisdictions. As noted above, this case is intrinsically maritime, involving the purchase, use and ultimate failure of marine turbines used to power huge oceangoing vessels. The nature of the vessels as mammoth oil tankers engaged in international commercial trade places them and the functioning *vel non* of their turbines crucial to their operation close to the heart of federal admiralty concerns.

Furthermore, at least in circumstances similar to those in this case, a uniform federal rule of strict liability is warranted. Ships such as these are likely to have contact with many fora no doubt exhibiting the same variation in their strict liability laws. They are unlikely to have predominant or exclusive contacts with only one locale. To make recovery on the part of an owner of such a vessel subject to the vagaries of chance as to where the defect manifests itself would introduce uncertainty and unpredictability into an important aspect of national

and international maritime commerce. Conflicting admiralty decisions on an issue of broad maritime commercial significance such as those raised in this suit would only handicap and interfere with the progress of maritime trade. One example of the way in which such lack of uniformity could adversely affect maritime commercial interests would be the destabilizing impact it would have on insurance rates for product liability coverage. Indeed, in the general area of products liability law, the Department of Commerce has perceived such a need for uniformity that it has issued a Model Uniform Product Liability Act (U.P.L.A.) for voluntary use by the states. 44 Fed. Reg. 62,714 (1979). It is noteworthy that the Act does not allow recovery for direct or consequential economic loss. U.P.L.A. § 102 [F] & Analysis [F], 44 Fed. Reg. 62,717, 62,719 (1979).

This court finds that highly significant maritime factors are involved in this case while relatively minor New Jersey interests are present.[9] In light of this finding this court concludes that a balancing of the two inescapably leads to a determination that federal maritime law and its attendant uniformity should apply in this case. Left free to determine the applicable maritime rule of law, this court joins with the *Maru* admiralty court and the majority of state courts which have faced the central issue in this case. Accordingly, this court holds that as a matter of federal maritime law, and as the better reasoned rule, damages for economic loss caused by defects in quality are not recoverable in tort.

Before leaving the subject of admiralty choice of law, the court must note that it is cognizant of the maritime tort cases advanced by plaintiffs wherein recovery was allowed for the cost of repairs to ships and for lost

9. It is alleged that all parties have their principal places of business in New Jersey although none are incorporated here.

profits. Extended discussion of these cases is unwarranted, however, since for a variety of reasons none of them are apposite. Most are irrevelant because of the undeniable presence of physical injury, either to the ship as a whole, parts of the ship other than the offending product, or to cargo.[10] Only one case is cited as providing recovery for loss in the absence of any physical injury.[11] Recovery in that case, however, was premised upon the special solicitude the admiralty law has for protecting the lost profits of fishing vessel owners and fishermen.[12] Thus, it, like the other admiralty tort cases cited by plaintiffs, is ultimately irrevelant to the instant case.

(2) *Criteria Employed in the Majority Rule.*

Having adopted the majority tort law view as outlined above, this court is next faced with the question of exactly what standards are to be applied in effectuating the majority rule of law. The recent *PGS* case, 652 F.2d 1165, provides an excellent exposition of the current majority common law position on the distinction between mere economic loss, uncompensable in tort, and physical injury.

In *PGS*, plaintiff bought a front-end loader from defendant manufacturer. Although this machine per-

10. *Sperry Rand Corp. v. Radio Corporation of America*, 618 F.2d 319, 320 (5th Cir. 1980) (vessel involved in collision and grounding); *Pan-Alaska Fisheries, Inc. v. Marine Construction and Design Co.*, 565 F.2d 1129 (9th Cir. 1977) (vessel caught fire and sank); *Jig the Third Corp. v. Puritan Marine Insurance Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976); *Anglo Eastern Bulkships Ltd. v. Ameran, Inc.*, 460 F. Supp. 1212 (S.D.N.Y. 1978) (contamination of cargo); *Sears, Roebuck & Co. v. American President Lines Ltd.*, 345 F. Supp. 395 (N.D. Cal. 1971) (cargo destroyed).

11. *Jones v. Bender Welding & Machine Works, Inc.*, 581 F.2d 1331 (9th Cir. 1978).

12. 581 F.2d at 1337.

formed its task adequately, it suddenly caught fire one day. Allegedly because the machine lacked a fire suppression/extinguishing system, the fire was exacerbated. Planitiff sued for the cost of repair and temporary replacement of the machine under negligence and strict liability theories, contending that the faulty design had left the front-loader in a hazardously defective condition and had enhanced the injury caused by the fire.

The case was brought under Pennsylvania law. Since that state's law was silent on the question of whether injury to a defective product itself was recoverable in tort, the Third Circuit undertook an examination of all sources of law on the subject and identified the majority position on the subject, which this court has adopted in admiralty.

The *PGS* court also isolated the majority approach to determining whether a loss is recoverable in tort or solely in a contract action. It first noted the class of damages sought is not determinative of their recoverability in tort *vel non*. 652 F.2d at 1173. Thus, the mere fact that a plaintiff seeks, for example, repair costs does not preclude an action in tort. *Id.* Where only the defective product itself is damaged, the majority approach is to ascertain whether the injury comprises economic loss or physical damage. *Id.* This separation of tort from contract is accomplished by analyzing "interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose." *Id.* Examination of these factors establishes whether the "safety-insurance policy of tort law of the expectation-bargain protection policy of warranty law is most applicable to a particular claim" *Id.*[13] For much the same reasons that this court

13. *See also Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 222 & n.10 (4th Cir. 1982) (it is the nature of risk that caused the injury, not nature of parties, which determines whether injury falls within tort law; showing of unreasonable dangerousness may be especially important in aiding court in distinguishing between tort and strict liability damages where it is a commercial party seeking recovery).

adopted the majority position regarding tort recovery for defects of quality, this court also holds that admiralty law should incorporate the *PGS* approach to distinguish between tort and contract damages.

(3) *Application of the PGS Factors to the Defective Turbines.*

This court comes now to the final question in this case, whether the injury to the defective turbines comprise damage under tort or under contract law. For the reasons which follow, the court finds that the harm sustained is cognizable solely in a contract action.

PGS itself presents an application of the relevant criteria. The *PGS* court noted that the nature of the defect and the type of risk it posed were the guiding factors. 652 F.2d at 1174. It pointed out that the damage to the front-end loader resulted from a fire, "a sudden and highly dangerous occurrence." *Id.* Since the alleged design defect failed to contain the fire and led to increased damages, it comprised a safety hazard posing "a serious risk of harm to people and property." *Id.* Additionally, a manufacturer's duty to furnish safe products may include an obligation to provide safety devices which will minimize the possibility of increased injuries. *Id.* at 1175. In light of these circumstances in the case before it, the *PGS* court held that the injury suffered was cognizable in tort. *Id.* at 1174-75.

With the *PGS* holding in mind, the court turns to the facts of the instant case. Since the circumstances of the

ships vary, the injury to them will be considered separately where necessary.

With regard to the Brooklyn and Williamsburgh, it is clear that the turbines on these two ships never evinced *any* signs of malfunctioning while in use, let alone precipitate any violent or hazardous incident of the sort relied upon by *PGS* in finding tort liability. Only because of the problems encountered with the Stuyvesant were these two ships inspected for defects at all. Furthermore, only via the inspection itself were the internal turbine problems of gradual breakage revealed. The Brooklyn and Williamsburgh turbines thus fall within the *PGS* recognized definitions of defects of quality as shortcomings "evidenced by internal deterioration or breakdown" and non-accidental causes in general, 652 F.2d at 1169 & n.13. Thus, this court has no choice but to find that the deterioration of the turbines on those two ships falls within the category of economic loss recoverable solely in contract.[14] Insofar as Count Four of the Complaint sets forth a claim for similar defects in the Bay Ridge's turbine, which particular defects never manifested themselves except upon examination, plaintiff Richmond must also be relegated to contract law for its recovery.

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14. It could be argued that the type of risk posed by defective turbine—the ultimate spectre of oceangoing vessels stranded at sea—constitutes sufficiently serious harm as to bring these turbines within tort law. The difficult with this approach is that it overlooks the PGS factor of the manner in which the injury arose. In the case of the Brooklyn and Williamsburgh, the circumstances indicate no sudden or accidental factors accompanying the deterioration. Also, the nature of the defect—gradual deterioration—was not such as intrinsically to pose an immediate risk of sudden or accidental harm. Put otherwise, the possibility of these ships being stranded is simply too speculative to permit recovery in tort, especially where the circumstances of the defect did not stem from a sudden, immediate dangerous occurrence.

Turning to the circumstances surrounding the Stuyvesant turbine damage, it is true that the defects complained of did manifest themselves while the ship was at sea after leaving Valdez, Alaska, loaded with oil. At that time, attempts to bring the ship to normal sea speed were rendered impossible allegedly because of the malfunctioning turbine. Nonetheless, the ship continued, albeit at reduced speed, on course for Panama, a voyage of some seven weeks. It was only after discharging its cargo in Panama that the Stuyvesant put into port for examination of the problem. Significantly, the ship was able to continue to San Francisco for this procedure. Thus, any nascent allegations of acute peril to the ship or crew resulting from the turbine defect are belied by the course of action undertaken after the defect manifested itself. The only additional factor in the case of the Stuyvesant is an incident which took place while the vessel was about to enter Valdez. A loud noise was heard in the engine room prompting an investigation which revealed that super-heated steam was escaping from a point between the steam inlet central valve chest and the high pressure turbine. Repairs made in Valdez corrected this problem, apparently without further incident.

Although true that escaping steam would pose a hazard to the crew, this problem antedated the turbine difficulties encountered after leaving Valdez, and was solved long before they commenced. There is lacking any clear assertion that the steam escape problem was even related, as either cause or effect, to the turbine problems forming the bulk of the recovery sought from Delaval. Finally, no damage was alleged to have occurred in connection with the escaping steam, unlike *PGS* where the dangerous occurrence was itself the source of the injury to the defective product.

As a result, this court finds that the apparently unrelated risk of escaping steam which occasioned no dam-

ages cannot serve to convert the qualitative defects in the Stuyvesant's turbine into physical damage recoverable in tort under *PGS*. Tort recovery for the damage to the Stuyvesant's turbine must therefore be denied for the same reasons precluding recovery for the other three ships.[15]

There remains only one issue for disposition. Count Five of the Second Amended Complaint sets forth an allegation that defendant was responsible for supervising the installation of the turbines, including the astern guardian valve thereto. That Count further alleges that due to defendant's negligent supervision, the valve was installed in reverse. This led, as defendant knew such a mistake would, to the entry of unwanted steam into the low pressure turbine. The steam's entry in turn caused extensive damage to the turbine and temporarily rendered the Bay Ridge inoperable. Plaintiff Richmond seeks recovery for the costs of repair and loss of income.

On its face, Count Five appears to set forth a proper cause of action in tort. It asserts that extensive physical damage to the low pressure turbine occurred as a direct result of negligence on defendant's part. Under the ma-

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15. The court notes that the Amended Complaint sought recovery only for damage to the high pressure turbine installed in the four ships whereas the Second Amended Complaint, currently governing the case, seeks recovery for injuries sustained by the low pressure turbine as well. The parties' summary judgment argument has apparently been directed solely toward the high pressure turbines. Nonetheless, the court intends that its disposition of the above issues encompass the low pressure turbines as well. This follows from the fact the Second Amended Complaint sets forth no new factual allegations which would bring the low pressure turbines any closer than the high pressure ones to the *PGS* standards for tort recovery. As a result, summary judgment on the above theories of tort recovery is granted as to the low pressure turbines as well.

jority view, this type of damage is fully recoverable in tort. Unlike Planitiff's other allegations regarding injury to the turbines, Count Five does not present an example of internal deterioration where the defects caused injury only to the turbine itself; no claim apparently is advanced as to the valve itself. Nor is the valve alleged to be an integral part of the turbine causing damage as a result of an internal qualitative defect. Rather, faulty installation of the valve as a discrete external instrumentality is alleged to have caused damage to the low pressure turbine. Accordingly, summary judgment as to Count Five must be denied.

In conclusion, summary judgment is granted defendant as to all of plaintiffs' claims with the exception of Count Five of the Second Amended Complaint. As outlined in this opinion summary judgment follows from the conclusion that with the above exception, plaintiffs have failed to state claims cognizable in admiralty tort law. In light of this resolution, this court expresses no opinion as to other grounds for summary judgment advanced by defendant.

Defendant will submit an appropriate form of order within 10 days.

DATED: October 5, 1982.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SEATRAIN LINES, INC., et al.,
Plaintiffs,
v.
CIVIL ACTION
NO. 80-238

DELAVAL TURBINE, INC., etc.,
Defendant.

SUPPLEMENTAL OPINION

MEANOR, District Judge.

In an Opinion dated October 5, 1982 [hereinafter "Opinion"], this court concluded that summary judgment should be granted in favor of defendant Delaval Turbine, Inc. [hereinafter "Delaval"] on the first four counts of plaintiffs' Second Amended Complaint; summary judgment was denied as to Count Five. Both sides have moved for re-argument pursuant to Local Rule 12(I).[1] With respect to the first four counts, the court has not ascertained any "matters or controlling decisions" which were overlooked in the original determination. For the reasons set forth in the Opinion, therefore, summary judgment shall be granted in favor of defendant on

1. Local Rule 12(I), Rules of the United States District Court for the District of New Jersey, provides:

> A motion for re-argument shall be served and filed within 14 days after the filing of the court's order on judgment on the original motion. There shall be served with the notice a memorandum, setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grant the motion and specifically directs that the matter shall be re-argued orally.

Counts One through Four of the Second Amended Complaint. Upon scrupulous re-examination of the record and pertinent legal authorities, the court is convinced that summary judgment should also be granted in favor of defendant on Count Five.

The Fifth Count alleges damage to the low pressure turbine of the T.T. Bay Ridge, a 225,000 ton supertanker built by Seatrain Shipbuilding Corporation.[2] Defendant Delaval contracted to furnish "1 Set Turbines [high and low pressure turbines], reduction gears, and all associated equipment and parts . . ." for the T.T. Bay Ridge.[3] Pursuant to the agreement, Delaval designed, manufactured and constructed the turbines which were installed in the vessel. Plaintiff Richmond Tankers, Inc. [hereinafter "Richmond"], charterer of the T.T. Bay Ridge, asserts that Delaval had the duty to "supervise the installation of the main propulsion unit together with certain appurtenances including the involved astern guardian valve."[4]

Richmond states that the T.T. Bay Ridge sustained damage to its low pressure turbine on March 13, 1980, while en route from New York to Valdez, Alaska. After stopping for inspection and limited repairs, the vessel proceeded at reduced speeds to a port of refuge at Talcahuano, Chile, for additional repairs. The T.T. Bay Ridge resumed its course for Valdez on March 22, 1980.

2. The T.T. Bay Ridge was built by Seatrain Shipbuilding Corp. under contract with Fillmore Tanker Corp. On March 15, 1979, title to the vessel was transferred to the U.S. Trust Company as trustee for Security Pacific Bank and American Road Equipment Corp. Thereupon, on March 15, 1979, the T.T. Bay Ridge was chartered to plaintiff Richmond Tankers, Inc., for a term of twenty-two years. Second Amended Complaint at Para. 6.

3. Purchase Order, dated July 5, 1973 (Defendant's Exhibit D); *see* Purchase Order, dated March 18, 1970 (Defendant's Exhibit C).

4. Second Amended Complaint at Para. 12(b); *see also Id.* at Para.8(b).

Plaintiff claims that the astern guardian valve was improperly installed in reverse, which caused steam to enter into and extensively damage the low pressure turbine. It is contended that the improper installation of the valve was a direct result of Delaval's negligent supervision.

A more detailed explication of the turbine damage was provided by plaintiff's expert, Encotech, Inc., in a report entitled "Investigation of Astern Turbine Failure on the T.T. Bay Ridge" [hereinafter "Encotech Report" or "Report"], dated March 4, 1981.[5] According to the Report, the T.T. Bay Ridge embarked from New York, on its maiden voyage, and sailed to Norfolk on February 22, 1980. The vessel departed for Rio de Janeiro on February 23, 1980, after stopping briefly in Norfolk. During most of the trip, turbine speed was about 92-93% of maximum; temperatures in the astern blading ranged from 1000° to 1100°F. This resulted in oxidation on the turbine blades which subsequently failed. On March 6, 1980, turbine speed rose to 95.9% of maximum; heating and stretching of the last row blading and rubbing between the blading and casing occurred. Some parts of the last row blading came off and lodged in the intermediate ring. While entering the Rio de Janeiro harbor, the vessel sustained damage to the first row blading. At this point, however, the damage was insufficient to be evident as external vibration.

The Encotech Report further states that the T.T. Bay Ridge departed Rio de Janeiro on March 7, 1980. Turbine speed of 95.2% of maximum was reached after the vessel rounded Cape Horn. Again, heating and stretch-

5. Defendant's Exhibit A in support of Notice of Motion for Re-Argument; *see* Answer to Interrogatory No. 37, Defendant's Third Set of Interrogatories.

ing of the last row blading occurred. Parts of the last row dislodged and became caught between the rotating blading and casing. Exacerbated rubbing produced overheated tip sections and very hot center sections. On March 13, 1980, as the ship was approximately 150 miles beyond Cape Horn, unacceptable vibrations began to emanate from the turbine. The vibrations "seemed to pick up fairly quickly" and increased even after engine speed was reduced. The vessel was slowed to a stop and the low pressure turbine was taken out of service. The T.T. Bay Ridge entered the Chilean port of Talcahuano for repairs. When the turbine was opened, it was discovered that the last row of the astern turbine blading was severely damaged and portions of the blading were missing. The Report concluded that damage to the last row blades occurred while the ship was operating forward, whereas damage to the first row second stage blades occurred while the ship was going astern. Evidence indicated that both failures were from the same cause.

The Encotech Report explained the "significance of turbine speed [in relation to the effect of steam leakage] in understanding the failure":[6]

> The stress in the tensile failure is directly proportional to the square of the turbine speed. Also, the heating resulting from steam leakage into the astern turbine is proportional to the speed squared. This means that as the stress trying to break the blade is going up, the strength of the material is coming down because of the increase in temperature.

6. Encotech Report at 7-4.

> The impact of temperature on material strength becomes very significant as temperatures in the neighborhood of 1100F are reached or exceeded. For example: at 1080F, type 422 material will rupture in about 1000 hours at a stress of 10000 psi. Raising this temperature to slightly over 1200F will result in failure in one hour at the same stress.

Charles R. Nealis, Vice-President of Engineering of Hudson Waterways, a subsidiary of plaintiff Seatrain Lines, Inc., testified that at the time of the casualty the astern guardian valve was found installed backwards. Nealis stated that the guardian valve is the "last resort" from stopping any steam leakage into the astern valve. According to Nealis, steam leakage into the astern valve would increase temperature of the astern unit to the low pressure turbine "to the point that metal will start stretching, and you will have a failure."[7]

Delaval contends that the injury alleged in the Fifth Count should be classified as "economic loss" for which compensation is not appropriate in tort. Richmond, of course, asserts that the Fifth Count sets forth a *prima facie* negligence claim. This controversy is resolved by application of the majority approach espoused by *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F. 2d 1165 (3d Cir. 1981) [hereinafter "*PGS*"], which is to identify whether a particular injury amounts to mere "economic loss" or "physical damage." *Id.* at 1169, 1173; *see* Opinion at 26-31. If an injury amounts to economic loss, recompense should be sought under the law of contract. On the other hand, where a particular injury may properly be characterized as physical harm or property damage, tort law provides the appropriate

7. Deposition of Charles R. Nealis, April 23, 1981, at 225-226.

avenue of redress.[8] The distinction is drawn by analyzing interrelated factors such as the nature of the defect, the type of risk and the manner in which the injury arose. *Id.* Defects of quality, evidenced by internal deterioration or breakdown, are assigned to the economic loss category. Loss stemming from defects that cause accidents of violence or collision with external objects is treated as physical injury. *Id.* at 1169-1170. Items for which damages are sought are not determinative of the distinction between economic loss and physical harm. *Id.* Thus, although Richmond seeks recovery for the cost of repairs, loss of use of the vessel and lost profits (which have traditionally been classified as items of economic loss), the *PGS* analysis must nonetheless be employed.

At oral argument, plaintiffs' counsel contended that the aforementioned principles, which were applied to the design defect allegations of the first four counts, are inapplicable to the Fifth Count which alleges negligent supervision. The court concludes, however, that the economic loss/physical harm dichotomy is equally pertinent whether the action is brought in strict liability or in negligence. Directly on point is *Flintkote Co. v. Dravo Corp.*, 678 F. 2d 942 (11th Cir. 1982), wherein the Eleventh Circuit recently held that the economic loss rule was applicable to causes of action alleging negligent inspection, observation and *supervision*. The precise contention made by plaintiff's counsel in the case *sub judice* was expressly rejected by the *Flintkote* Court. *Id.* at 950-951. Similarly, in *Jones & Laughlin Steel Corp. v. Johns-*

8. The *PGS* Court reasoned that the distinction is based, in part, on the different interests protected by tort and contract law. Contract law, which protects expectation interests, provides the appropriate set of rules when an individual wishes a product to perform a certain task in a certain way or expects a product of a particular quality. Tort law protects a party from exposure to an unreasonable risk of injury to his person or property. 652 F.2d at 116.

Manville Sales Corp., 626 F. 2d 280 (3d Cir. 1980), plaintiff sought recovery for defendant's alleged "negligent performance of an undertaking to render services"; application of the economic loss rule was held to preclude relief on the negligence claim. *See also Seely v. White Motor Co.*, 63 Cal.2d 9, 403 P.2d 145 (1965) (manufacturer's liability limited to damages for physical injuries in actions for negligence, no recovery for economic loss alone); W. Prosser, Law of Torts § 101, at 665 (4th ed. 1971) (purely economic interests not entitled to protection against mere negligence); Restatement (Second) of Torts § 323, at 135-39 (1965) (liability of one who negligently performs an undertaking to render services limited to physical harm caused by the negligence).

Here, in view of the nature of the defect, the type of risk and the manner in which the injury occurred, the conclusion is inescapable that plaintiff Richmond suffered purely economic losses. Richmond alleges that the astern guardian valve was improperly installed in reverse which caused steam to enter into and extensively damage the low pressure turbine. However, there is no evidence that installation of the guardian valve in reverse constituted a safety hazard that posed a serious risk of harm to persons or property. *See PGS*, 652 F. 2d at 1174. Patrick O'Shea, former machinery superintendant of plaintiff Seatrain Shipbuilding Corporation, testified that backwards installation of the astern guardian valve was not dangerous, but "could lead to damage" to the unit designed by Delaval.[9] Significantly, there was not "accident of violence or collision with external objects."[10] *Id.*

9. Deposition of Patrick O'Shea, April 30, 1981, at 149.

10. This court was originally under the impression that the astern guardian valve was a "discrete external instrumentality" separate and apart from the low pressure turbine. *See* Opinion at 31. The

at 1170. Although vibrations became manifest on March 13, 1980, which necessitated stopping the vessel for inspection and limited repairs, there was no sudden or highly dangerous occurrence or other calamity. The T.T. Bay Ridge was able to seek refuge at Talcahuano, Chile, for additional repairs, albeit at reduced speeds. Thereafter, the voyage to Valdez, Alaska, resumed.

The Encotech Report clearly and unequivocally reveals that the damage was occasioned by internal deterioration and breakdown. According to the Report, the last row of blading of the turbine began to dislodge at least as early as March 6, 1980, when turbine speed reached 95.9% of maximum. Oxidation on the turbine blades had apparently begun earlier in the voyage. Subsequently, more of the last row blading dislodged and became caught between the rotating blading and casing

pleadings, exhibits and deposition testimony reveal, however, that the guardian valve was an integral part of the main propulsion unit supplied by Delaval. First, plaintiff alleges in the Complaint that Delaval had the duty to supervise installation of "the main propulsion unit together with certain appurtenances including the involved astern guardian valve." Second Amended Complaint at Para 12; *see Id.* at Para. 8(b). Second, Delaval contracted to furnish the low and high pressure turbines "and all associated equipment and parts." *See* footnote 4, *supra*. Third, Charles R. Nealis testified that the astern guardian valve was "a part of the unit supplied by Delaval." Deposition of Charles R. Nealis, April 23, 1981, at 225. Fourth, Patrick O'Shea testified that the astern guardian valve was a component part of the system designed and planned by Delaval. Deposition of Patrick O'Shea, April 30, 1981, at 14. Delaval refers to *Northern Power & Engineering Corp. v. Caterpillar Co.*, 623 F.2d 324 (Alaska 1981), which held that when a defective product creates a situation potentially dangerous to persons or *other* property, recovery in tort is appropriate. Delaval argues that *Northern Power* is dispositive since the astern guardian valve is merely a component of the main unit furnished by it. However, this factor is not *ipso facto* determinative under the majority approach adopted by the *PGS* Court, *supra*. The majority employs virtually the same analysis regardless of whether the ultimate impact of the hazard is on other property or on the product itself. *See PGS*, 652 F.2d at 1165.

whereupon vibrations reached an "unacceptable" level on March 13, 1980.

The facts in *S.M. Wilson & Co. v. Smith International, Inc.*, 587 F. 2d 1363 (9th Cir. 1978), are strikingly similar to the present factual scenario. There, defendant designed, built and delivered a rock tunnel boring machine which plaintiff purchased. Defendant purportedly had the duty to supervise installation of the machine at a mine shaft in Illinois. Plaintiff alleged that the machine bored at a rate slower than expected, overheated, broke down and wore out blades faster than had been projected. Plaintiff discovered that the machine's thrust rollers had been installed in a reverse position which was allegedly a major cause of the machine's poor performance. Plaintiff alleged, *inter alia*, that defendant negligently failed to provide a competent reassemble supervisor. The district court found no cause of action in negligence since plaintiff suffered only economic loss and not personal or property damage. The Ninth Circuit Court of Appeals affirmed, reasoning that plaintiff's remedies should be limited to thise provided by the Uniform Commercial Code. Judge Sneed appropriately remarked: "To treat such a breach as an accident is to confuse disappointment with disaster." *Id.* at 1376. *See also Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324 (Alaska 1981) (defective low oil pressure shutdown mechanism caused engine to overheat and seize; held, buyer's loss purely economic, no recovery in tort permitted); *Long v. Jim Letts Oldsmobile, Inc.*, 135 Ga.App. 293, 217 S.E.2d 602 (1975) injury deemed economic loss where defective radiator destroyed engine).

Accordingly, for the factual and legal reasons set forth herein, summary judgment shall be granted in favor of defendant on Count Five of the Second Amended Complaint. Also, as the court had previously concluded, summary judgment shall be granted in favor of defendant on the first four counts of the Second Amended Complaint.

An appropriate Order will follow from this court.

DATED: January 21, 1983.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SEATRAIN LINES, INC., ET AL., PLAINTIFFS,
v.
DELAVAL TURBINE, INC., ETC., DEFENDANT.

CIVIL ACTION NO. 80-238

JUDGMENT

This matter having come before the Court on motion for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure by Kasen & Kraemer, Esqs., and Guggenheimer & Untermyer, Esqs., attorneys for defendant, and Thomas E. Durkin, Jr., attorney for plaintiffs, appearing in opposition, and the Court having thereupon rendered an Opinion dated October 5, 1982, and the parties by their respective attorneys having subsequently moved for re-argument of this Court's determination, and the Court having heard and considered the arguments of counsel and having rendered a Supplemental Opinion dated January 21, 1983, and for good cause shown.

IT IS on this 21st day of January, 1983, ORDERED and ADJUDGED that:

Defendant's motion for summary judgment be and is hereby granted as to all Counts of the Second Amended Complaint for the reasons set forth in this Court's Opinion dated October 5, 1982, and Supplemental Opinion dated January 21, 1982; and

IT IS FURTHER ORDERED and ADJUDGED that all Counts of the Second Amended Complaint be and are hereby dismissed, with prejudice.

/s/ H. CURTIS MEANOR

H. CURTIS MEANOR
U.S.D.J.

OPPOSITION

BRIEF

No. 84-1726

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EAST RIVER STEAMSHIP CORP., KINGSWAY TANKERS, INC., QUEENSWAY TANKERS, INC., and RICHMOND TANKERS, INC.,

Petitioners,

vs.

TRANSAMERICA DELAVAL INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

May petitioners, charterers of oil tankers, maintain an action in tort under federal maritime law against the seller of main propulsion units for the tankers, arising from an alleged product defect, where the damage sustained was confined to the units themselves and consisted solely of internal deterioration and breakdown, and there was no unreasonable risk of harm to persons or other property?

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OCTOBER TERM, 1984

No. 84-1726

EAST RIVER STEAMSHIP CORP., KINGSWAY TANKERS, INC., QUEENSWAY TANKERS, INC., and RICHMOND TANKERS, INC.,

Petitioners,

vs.

TRANSAMERICA DELAVAL INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent Transamerica Delaval Inc. ("Delaval") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion and judgment of the United States Court of Appeals for the Third Circuit in banc in this case.[1]

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1 Pursuant to Sup. Ct. R. 28.1, Delaval notes that its parent corporation is Transamerica Corporation and that it does not believe that it has any subsidiaries or affiliates within the meaning of the Rule.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit in banc is reported as *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (1985). The Third Circuit affirmed the decision of the United States District Court for the District of New Jersey, No. 80-238 (October 5, 1982) and the supplemental opinion rendered after reargument (January 21, 1983), neither of which is officially reported. All three opinions appear in the appendix ("Pet. App.") to the petition for a writ of certiorari ("Pet.") beginning at 1a, 37a and 72a, respectively.[2]

STATEMENT OF THE CASE

Delaval and Seatrain Shipbuilding Corp. ("Shipbuilding"), a wholly-owned subsidiary of Seatrain Lines, Inc. ("Seatrain"), entered into an agreement whereby Delaval agreed to design and manufacture main propulsion units for ships to be built by Shipbuilding: the T.T. Stuyvesant (the "Stuyvesant"), the T.T. Williamsburgh (the "Williamsburgh"), the T.T. Brooklyn (the "Brooklyn") and the T.T. Bay Ridge (the "Bay Ridge"). 752 F.2d at 905, Pet. App. at 3a; Pet. App. at 39a.

Shipbuilding constructed each vessel under separate construction contracts with wholly-owned subsidiaries of Seatrain; each subsequently transferred title to the vessel to its current owner, none of which is a party to this action. Pet. App. at 39a. Petitioners East River Steamship Corp. ("East River"), Kingsway Tankers, Inc. ("Kingsway"), Queensway Tankers, Inc. ("Queensway") and Richmond Tankers, Inc. ("Richmond") are the four entities to which each owner chartered the vessels. Pet. App. at 39a.

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2 A review of petitioners' appendix indicates that the opinion of the Third Circuit in the appendix is partially inaccurate. For example, the first full sentence on Pet. App. 3a does not appear in either the slip opinion or the reported opinion of the Third Circuit. Accordingly, this brief refers throughout to the reported opinion of the Third Circuit (as well as the appendix) wherever possible.

I.

Vessels Involved

A. The Stuyvesant

Construction of the Stuyvesant was completed in July 1977. 752 F.2d at 905, Pet. App. at 3a. On December 11, 1977, as the Stuyvesant was entering the Port of Valdez in Alaska, steam was discovered to be issuing from the junction of its steam inlet control valve chest and high pressure turbine casing. Pet. App. at 40a. There is no evidence that the steam escape problem was related, either as cause or effect, to any turbine problem which developed later. Pet. App. at 69a. The steam escape problem was corrected in Valdez, and no damages are alleged to have occurred in connection with the escaping steam. Pet. App. at 69a. The Stuyvesant subsequently loaded its cargo of oil in Valdez and proceeded on December 13, 1977 for Parita Bay, Panama. Pet. App. at 40a.

Shortly after leaving Alaska, the Stuyvesant experienced a problem with its high pressure turbine. 752 F.2d at 905, Pet. App. at 4a. The problem allegedly prevented the ship from proceeding at normal speed.[3] 752 F.2d at 905, Pet. App. at 4a. Nevertheless, the ship proceeded to Panama without stopping for inspection or repairs. 752 F.2d at 905, Pet. App. at 4a. The reduced speed of the Stuyvesant, associated with the gradual internal deterioration of the turbine, did not pose an unreasonable risk of injury to persons or property. 752 F.2d at 909, Pet. App. at 13a; Pet. App. at 69a.

After stopping in Panama to discharge its cargo, the Stuyvesant continued to San Francisco, California where it arrived on January 27, 1978, approximately seven weeks after leaving Alaska. 752 F.2d at 905, Pet. App. at 4a; Pet. App. at 40a. In San Francisco an inspection of the high pressure turbine

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3 An unsworn letter submitted in opposition to summary judgment noted that the Stuyvesant experienced high seas and some drifting off the coast of Alaska. 752 F.2d at 905, Pet. App. at 4a. The Third Circuit noted that "[t]he ship, however, did successfully travel against the storm . . . . " 752 F.2d at 909 n.3, Pet. App. at 14a n.3.

revealed damage to several of its parts including the first stage steam reversing ring ("guide bucket ring"). 752 F.2d at 905, Pet. App. at 4a; Pet. App. at 40a. After the damaged parts had been replaced with similar parts from the Bay Ridge, then under construction, the Stuyvesant resumed operation. Pet. App. at 40a.

In April 1978, the Stuyvesant again docked in San Francisco, where its high pressure turbine guide bucket ring was inspected and found to have deteriorated. 752 F.2d at 905, Pet. App. at 4a; Pet. App. at 40a. The guide bucket ring, which had previously been taken from the Bay Ridge, was replaced by another guide bucket ring, taken from the Brooklyn. 752 F.2d at 905, Pet App. at 4a. The Stuyvesant later received newly designed rings for both its high and low pressure turbines. 752 F.2d at 905, Pet. App. at 4a; Pet. App. at 40a.

B. The Brooklyn And The Williamsburgh

As a result of the problem experienced by the Stuyvesant, the two ships constructed prior to the Stuyvesant—the Brooklyn in 1973 and the Williamsburgh in 1974—were inspected for damage in port in March 1978. Pet. App. at 40a. Neither the Brooklyn nor the Williamsburgh had "evinced *any* signs of malfunctioning while in use." Pet. App. at 68a (emphasis in opinion). Examination of both ships revealed damage to their high pressure turbines which was in some respects similar to that found on the Stuyvesant. 752 F.2d at 905, Pet. App. at 4a-5a.

The guide bucket ring of the Brooklyn's high pressure turbine (which had been installed in the Stuyvesant in April, 1978) was replaced in June 1978 with a guide bucket ring which had been removed from the Stuyvesant and repaired. Pet. App. at 40a-41a. In August 1978, the Brooklyn received a newly designed guide bucket ring and underwent repairs to its low pressure turbine. 752 F.2d at 905, Pet. App. at 5a; Pet. App. at 41a.

The guide bucket ring of the Williamsburgh's high pressure turbine was repaired in late March and early April 1978. Pet.

App. at 41a. Later that year, a newly designed guide bucket ring was installed in the Williamsburgh. Pet. App. at 41a. In December 1979 and January 1980, the high and low pressure turbines of the vessel underwent additional repairs. 752 F.2d at 905, Pet. App. at 5a; Pet. App. at 41a.

C. The Bay Ridge

The Bay Ridge allegedly sustained damage to its low pressure turbine while en route from New York to Valdez, Alaska on a voyage beginning on February 22, 1980. Pet. App. at 73a. On March 13, 1980, the Bay Ridge experienced vibration soon after passing Cape Horn. Pet. App. at 75a. The vessel subsequently proceeded to the Port of Talcahuano in Chile for repairs. Pet. App. at 75a. Repairs to the low pressure turbine were completed in several days, and the ship resumed its course to Valdez, Alaska. 752 F.2d at 905, Pet. App. at 5a.

The damage to the low pressure turbine was allegedly caused by the installation in reverse of the astern guardian valve, a part of the main propulsion unit supplied by Delaval and installed by Shipbuilding, allegedly under Delaval's supervision. Pet. App. at 74a. The damage to the low pressure turbine took place gradually and was occasioned by internal deterioration [illegible] breakdown. Pet. App. at 79a. The low pressure turbine blades of the Bay Ridge first developed oxidation; heating, stretching and rubbing of turbine parts then took place; and parts of the turbine became dislodged within the turbine. Pet. App. at 74a-75a. The damage to the Bay Ridge's low pressure turbine did not pose a serious risk of harm to persons or other property. Pet. App. at 78a.

The problems experienced by all four ships were caused by gradual internal deterioration of the turbines' parts. 752 F.2d at 909, Pet. App. at 12a. The alleged defects manifested themselves over a period of time during normal operation of the turbines. 752 F.2d at 906-07, 909, Pet. App. at 7a, 13a. No injury or risk of injury to persons or property other than the main propulsion units resulted from the alleged malfunctions. 752 F.2d at 909, Pet. App. at 13a.

II.

Second Amended Complaint

The charterer of each of the four ships asserted a claim against Delaval for defects in the main propulsion unit of the ship it chartered. In the first four counts of the second amended complaint, each charterer seeks to recover in strict tort liability for Delaval's allegedly defective guide bucket ring. 752 F.2d at 905, Pet. App. at 5a. In the fifth count, Richmond seeks to recover in negligence for Delaval's allegedly negligent supervision of the installation of the Bay Ridge's astern guardian valve. 752 F.2d at 906, Pet. App. at 5a. There is no claim in negligence except in the fifth count. Petitioners allege that they suffered loss in the nature of costs of replacement and repair and lost profits from "down-time." 752 F.2d at 904-905, Pet. App. at 3a.

The second amended complaint contains no claim for breach of contract or breach of warranty by any of the petitioners. The second amended complaint was filed after Delaval moved for summary judgment dismissing, among other things, the breach of contract and breach of warranty claims in the amended complaint.[4] All such claims were dismissed with prejudice by order of the District Court. The negligence claims in the amended complaint of East River, Kingsway and Queensway (for Delaval's allegedly defective guide bucket ring) were also deleted from the second amended complaint and dismissed with prejudice by the District Court at the same time.[5]

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4 Dismissal of the breach of contract and breach of warranty claims was sought upon the basis of the statute of limitations and contractual provisions limiting petitioners' remedies and disclaiming warranties other than those contained in the contract for the sale of the main propulsion units.

5 In its order granting leave to file the second amended complaint, the District Court ordered the dismissal with prejudice of the claims for breach of contract, breach of warranty and negligence.

III.

Opinion Of The District Court

On Delaval's motion for summary judgment, the District Court (Meanor, J.) dismissed the first four of the five counts in the second amended complaint, all of which sought recovery in strict tort liability. Pet. App. at 37a. The District Court held that the action was governed by federal maritime law. Under federal maritime law, the court found, there is no recovery in tort for defects in product quality, absent personal injury or damage to property other than the defective product itself or an unreasonable risk of such damage, such as would arise from sudden and calamitous occurrences. Pet. App. at 66a-70a; Pet. App. at 76a-80a. The District Court upheld the fifth count which sought recovery in negligence on the basis of its erroneous assumption that the astern guardian valve was not part of the main propulsion unit supplied by Delaval. Pet. App. at 70a-71a.

Upon reargument, the Court rendered a supplemental opinion dismissing the fifth count on the grounds that the astern guardian valve was in fact an integral part of the main propulsion unit and that the fifth count also impermissibly sought recovery in tort for a qualitative product defect. Pet. App. at 78a, 80a-81a. On January 21, 1983, the Court entered judgment dismissing the action with prejudice. Pet. App. at 81a. Petitioners appealed to the United States Court of Appeals for the Third Circuit from the judgment of the District Court.

IV.

Opinion Of The Third Circuit In Banc

The Third Circuit in banc affirmed the judgment of the District Court dismissing this action. The Third Circuit held that petitioners had no claims in tort under the prevailing view that damage due to a defective product is not actionable in tort

unless the defective product harms or creates an unreasonable risk of harm to persons or property other than the product itself. 752 F.2d at 908, Pet. App. at 10a.

The Court found that unlike the "defect in those cases in which tort recovery is allowed for a damaged product," the defect in this case was neither related to the safety of the product nor "associated with calamitous events like fire or sudden collision." 752 F.2d at 909, Pet. App. at 12a. Rather, the defect involved internal deterioration and breakdown of the turbines' parts, which reduced the ship's speed and caused the charterers losses in the form of down-time for repair and lost profits. 752 F.2d at 909, Pet. App. at 13a. The alleged defect implicated only the intended performance level of the turbines and the "charterers' disappointed expectations in their purchase." 752 F.2d at 909, Pet. App. at 12a.

Since the Third Circuit found that petitioners lacked any valid claims in tort, the Court held that the District Court properly granted summary judgment against petitioners on all five counts. 752 F.2d at 910, Pet. App. at 14a.

Petitioners' application for a rehearing by the Third Circuit was denied. Pet. App. at 35a.

SUMMARY OF THE ARGUMENT

The Third Circuit in banc correctly held that there can be no recovery in tort in this case where damage was sustained only by the defective products themselves and consisted solely of internal deterioration and breakdown and there was no serious risk of harm to persons or other property. The in banc opinion properly demarcates the boundaries between contract and tort and preserves the statutory scheme of the Uniform Commercial Code.

There are no conflicts in the circuits which warrant granting the writ. Cases cited by petitioners are primarily in negligence (while petitioners' claims are primarily in strict tort liability) or involve fishing vessels where special rules pertain. In some of these cases there either are no product defects or there is damage to property other than the defective product itself or an unreasonable risk of such damage. Petitioners also mistakenly refer to the types of damages recoverable in proper maritime tort cases. The issue here is whether petitioners have valid tort claims at all, not what type of damages would be recoverable if they had such claims.

Petitioners claim that the Third Circuit's opinion encourages improper conduct on the part of manufacturers. On the contrary, the Uniform Commercial Code amply regulates the conduct of manufacturers and properly allocates risks of loss in commercial transactions such as those here involved.

Accordingly, the petition for a writ of certiorari should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Supposed Conflict In The Circuits Is Not Such As To Warrant Granting The Writ

Petitioners allege that there is a conflict in decisions among the circuits warranting review, but Supreme Court Rule 17 narrowly limits the Court's discretion to grant certiorari to those instances "when there are special and important instances therefor." S. Ct. R. 17.1. For the reasons set forth below, the writ of certiorari should be denied.

A. The Cases Supposedly In Conflict Are Primarily In Negligence And Thus There Is No Square Conflict

Contrary to petitioners' contentions, there is no square conflict in the circuits. To begin with, *East River* involves five counts, four of which are in strict tort liability and only one of which is in negligence. Indeed, with the exception of the fifth count (asserted by Richmond only), petitioners withdrew their negligence claims, and those claims were dismissed with preju-

dice by the District Court. *See supra* at 6. There is no negligence claim pertaining to any ship other than the Bay Ridge.

Except for *Emerson G.M. Diesel, Inc. v. Alaskan Enterprise*, 732 F.2d 1468 (9th Cir. 1984), all the cases in supposed conflict with *East River* involve negligence claims.[6] *See Ingram River Equipment, Inc. v. Pott Industries, Inc.*, 756 F.2d 649 (8th Cir. 1985); *Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984); and *Jig the Third Corp. v. Puritan Marine Insurance Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976). Furthermore, in *Miller Industries*, there was no recovery for a product defect but rather for a negligent breach of the duty to warn. As *Miller Industries* noted, a "duty to warn" does not pertain to the "quality of the product that the buyer expects from the bargain." 733 F.2d at 818. Such a supposed conflict in the circuits therefore does not merit review by this Court.

B. The Cases Supposedly In Conflict Primarily Entail Rules Applicable To The Fishing Industry Which Are Inapposite Here

The nature of the enterprise involved in the present case further distinguishes the holdings of three decisions said to be in conflict, *Emerson*, *Miller Industries*, and *Jig the Third*, from that of the Third Circuit. As the District Court recognized, suits for lost profits by commercial fishermen and fishing vessel owners are "ultimately irrelevant" to cases not involving fishermen because of the "special solicitude the admiralty law has for protecting the lost profits of fishing vessel owners and fishermen." Pet. App. at 65a. *Emerson*,

6 Petitioners overstate their case in arguing that the Third Circuit is in conflict with the Fifth, Eighth, Ninth and Eleventh Circuits on "the strict liability in tort issues." Pet. at 11. Of the four circuit cases cited by petitioners for this point, only one (*Emerson* in the Ninth Circuit) involves strict tort liability. The other three, in the Fifth, Eighth and Eleventh Circuits, involve negligence.

Miller Industries and *Jig the Third* all involve fishing vessels;[7] *East River*, by comparison, involves large oil tankers.

Indeed, because of their special solicitude for the fragile livelihood of fishermen, whose wages consist of a share of the catch, both Congress and the courts have modified the common law in other respects to furnish fishermen with special protection. *See Carbone v. Ursich*, 209 F.2d 178, 182 (9th Cir. 1953) (fishermen are beneficiaries under a "special rule which ma[k]e[s] the wrongdoer liable . . . for the losses of the fishermen . . . ."); *Jones v. Bender Welding & Machine Works, Inc.*, 581 F.2d 1331, 1337 (9th Cir. 1978) ("fishing vessel owners and commercial fishermen may recover for lost fishing profits"); *Rodrigues v. Campbell Industries*, 87 Cal. App. 3d 494, 499-500, 151 Cal. Rptr. 90, 92 (1978) (following *Carbone*); *see also* 46 U.S.C. § 531 (vessel master required to enter into written agreement with each fisherman specifying that the fisherman is entitled to the proportion of fish which he has caught); 46 U.S.C. § 533 (fishermen entitled to bring an action against fishing vessel).

The viability of the special rule protecting commercial fishermen is not at issue here. Petitioners are not commercial

7 Other cases cited by petitioners as permitting recovery for qualitative product defects in tort also involve the fishing industry. *See Miller Industries, Inc. v. Caterpillar Tractor Co.*, 473 F. Supp. 1147 (S.D. Ala. 1979), *vacated on other grounds*, 516 F. Supp. 84 (S.D. Ala. 1980) (lost fishing profits; same case as *Miller Industries*, 733 F.2d 813 (11th Cir. 1984), although referred to separately by petitioners); *Laurentine, Inc. v. General Motors Corp.*, 1980 A.M.C. 715 (S.D. Ala.) (fishing vessel; decided by same judge as decided *Miller Industries, Inc., v. Caterpillar Tractor Co.*, 473 F. Supp. 1147 (S.D. Ala. 1979)); *Berg v. General Motors Corp.*, 87 Wash. 2d 584, 555 P.2d 818 (1976) (negligence action by commercial fisherman). *See also Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784, 793 (1978) (noting that *Berg* permitted recovery because it involved a malfunction of a commercial fishing vessel). *Vessel Management, Inc. v. Caterpillar Tractor Co.*, Civil Action No. 80-110-NN (E.D. Va. Jan. 4, 1982), *aff'd*, No. 82-1160 (4th Cir. Feb. 14, 1983), not only involved a negligence action for damage to a fishing vessel, but involved a sudden and dangerous occurrence: an engine explosion arising from a defective engine governor. *See infra*, Point III. A. at 17-18.

fishermen, but charterers of large oil tankers. Thus the Third Circuit's decision denying recovery in tort does not conflict with *Emerson*, *Miller Industries* or *Jig the Third*.

C. Other Cases Supposedly In Conflict Differ Since They Do Not Concern Qualitative Product Defects

Also misconceived is petitioners' assertion that there is a conflict with the Second and Fifth Circuits as to any claim in this case. A qualitative product defect, which is central to this case, is not involved in either of the decisions cited from those circuits.

Thus the Fifth Circuit case supposedly in conflict, *Jig the Third Corp. v. Puritan Marine Insurance Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975) (recovery allowed in negligence where shrimp boat sinks at sea because of defective shaft assembly), involved a calamitous event (a sinking ship) and damage to property other than the allegedly defective product. *See Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d at 817-18 & n.7 (noting that *Jig the Third* might be considered to be a case involving damage to other property or a calamitous event).

Also irrelevant is the case petitioners rely on from the Second Circuit, *Compania Pelineon de Navegacion S.A. v. Texas Petroleum Co.*, 540 F.2d 53 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), in which a product defect was not even alleged. Rather, the negligence of defendant's employees in berthing the ship (such that its propeller became fouled) was acknowledged to be the cause of the physical damage to the ship. 540 F.2d at 54.[8]

8 Petitioners also advert to other circuit court cases as being in conflict in an effort to impress the Court with a large number of citations. However, none of these cases involves product defects, let alone qualitative product defects. For instance, they cite *Alcoa Steamship Co. v. Charles Ferran & Co.*, 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 393 U.S. 836 (1968); *Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401 (5th Cir.), *cert. denied*, 459 U.S. 1036 (1982) and *National Steel Corp. v. Great Lakes Towing Co.*, 574 F.2d 339 (6th Cir. 1978). *Alcoa* involved the negligence of a boiler repair crew which caused a fire aboard ship, a dangerous event, *see infra*, Point III. A. at 17-18; *Todd Shipyards* also involved vessel repairs; and *National Steel* concerned the collision of a towing vessel against a railroad bridge. None of these cases is in conflict with the Third Circuit's opinion.

Prudential Lines, Inc. v. Avondale Shipyards, Inc., 1984 A.M.C. 2036 (S.D.N.Y. 1983), which petitioners also cite, indicates that recovery in strict tort liability for qualitative product defects may be barred and thus is consistent with *East River*. *See* 1984 A.M.C. at 2038. *Accord*, *Ingram River*, 756 F. 2d at 653 (in which the Court suggested that recovery for a product defect might not be allowable in strict liability "where the alleged defect did not result from any lack of due care"). Although permitting recovery in negligence, *Prudential* relied on inapposite cases which either did not involve defective products or which involved damages not restricted to the allegedly defective product itself; thus such cases did not permit recovery in negligence for qualitative product defects.

D. The Recency Of The Supposed Conflict Militates Against Review

The decision whether or not to deny a writ of certiorari in a particular case rests in part on the newness of the issues involved. Ordinarily, there is a substantial delay between the first decision by a circuit court on a legal issue over which a conflict develops and the granting of a writ of certiorari. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 Yale L.J. 677, 688 (1984).

The wisdom of allowing issues to mature through consideration by the courts of appeal has been expressly acknowledged by this Court as a whole, *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977), as well as by its individual members. Justice Stevens is quoted by Justice Brennan as observing that "experience with conflicting interpretations of federal law may help to illuminate an issue before it is finally resolved." Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983).

The issue of tort recovery for qualitative product defects under federal maritime law is a relatively new issue. Indeed,

the issue of whether there could be recovery in tort for qualitative product defects was not decided under federal maritime law until the 1981 decision in *Maru Shipping Co. v. Burmeister & Wain American Corp.*, 528 F. Supp. 210 (S.D.N.Y. 1981) (strict tort liability recovery denied; court indicates matter is of first impression in admiralty). Accordingly, the issues presented are not appropriate for review by this Court at this time.

II.

There Is No Important Question Of Federal Law Such As To Warrant Review By This Court; Nor Is There Any Conflicting Decision Of This Court

Other factors relevant to deciding whether to deny a petition for a writ of certiorari are whether a "federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." S. Ct. R. 17.1(c). This case does not involve an important question of federal law meriting review by this Court; nor does the opinion by the Third Circuit conflict with applicable decisions of this Court.[9]

A. The Opinion Of The Third Circuit In Banc Arises From A Fortuitous Confluence Of Facts

The issue of recovery in tort for qualitative product defects becomes significant only in specific instances which arise be-

9 Petitioners claim that the fact that the Third Circuit heard the case in banc demonstrates the importance of the issues concerned. Petitioners neglect to mention that in *Emerson, Miller Industries* (*reh'g denied*, 738 F.2d 451 (1984)) and *Ingram River*, which, according to petitioners, are supposedly in conflict with *East River*, the circuit courts refused to rehear such cases in banc. Under petitioners' reasoning, this presumably demonstrates the lack of importance of the issues.

cause of a fortuitous and perhaps even rare confluence of specific facts. Because this set of facts is unlikely to recur with any frequency, and a decision by this Court will accordingly affect few other parties, the issue does not present an important question of federal law which warrants review by this Court. *Cf. Alcoa Steamship Co. v. United States*, 338 U.S. 421, 423 (1949) ("[W]e granted certiorari because determination of the issue raised here will guide adjustment of a large body of similar claims now pending.")

A product defect will not be qualitative in nature unless the following factors are present: (a) no damage to property other than the allegedly defective product; (b) no personal injury; and (c) no sudden and calamitous occurrence posing an unreasonable risk of harm to persons or other property. Furthermore, whether recovery in tort is permitted is academic if the claimant has valid claims for breach of warranty or contract, *see Ingram River v. Pott Industries*, 756 F.2d at 653 n.7 (court notes that breach of warranty theory is an alternative theory of recovery to negligence, and because recovery was awarded in negligence, declines discussion of warranty claim as unnecessary), or if liability in tort has been effectively disclaimed. Because such circumstances are unlikely to recur with any regularity, important reasons for granting the writ of certiorari are lacking.

B. Cases Decided By This Court Do Not Conflict With The Decision Of The Third Circuit In Banc

Petitioners misconceive the import of some early Supreme Court precedent when they argue that *East River* creates a conflict with decisions by this Court. On the contrary, there is no such conflict.

To begin with, *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824) and *The Conqueror*, 166 U.S. 110 (1897), which petitioners cite at Pet. 16-17, involve claims for wrongful seizure rather than claims for qualitative product defects under federal maritime

law.[10] The type of damages recoverable in proper maritime tort cases such as *The Apollon* and *The Conqueror* is irrelevant. Instead, the issue is whether petitioners state a cause of action in tort under federal maritime law so as to be entitled to any recovery whatsoever. As the Third Circuit held, the question in this case

> is not what losses can be recovered once an act has been characterized as a tort, but whether under the modern law of products liability, as it has been imported into the law of admiralty, a products liability complaint that seeks recovery for damage to a product caused by a design defect states a cause of action in tort.

752 F.2d at 907-08, Pet. App. at 10a.

Therefore, ancient decisions of this Court concerning the type of damages available where a valid tort claim is found to exist are not in conflict with the decision of the Third Circuit.

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10 Indeed, petitioners may not fairly cite either case as authority to support their position. When *The Apollon* and *The Conqueror* were decided, products liability claims sounding in negligence or strict tort liability such as those asserted here could not be maintained under federal maritime law. Tort recovery in a products liability context, whether for strict tort liability or negligence, in the absence of privity, is a new concept in federal maritime law. Strict tort liability did not enter federal maritime law until the 1970's. *See Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129, 1134-35 (9th Cir. 1977); *Lindsay v. McDonnell Douglas Aircraft Corporation*, 460 F.2d 631, 635 (8th Cir. 1972). The doctrine permitting recovery in negligence for allegedly defective products in the absence of privity, *see MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), upon the basis of which Richmond seeks recovery on the fifth count, was first incorporated into the law of admiralty by *Sieracki v. Seas Shipping Co.*, 149 F.2d 98, 99-100 (3d Cir. 1945), *aff'd*, 328 U.S. 85 (1946). *See also In re Alamo Chemical Transportation Co.*, 320 F. Supp. 633, 634 (S.D. Tex. 1970) (products liability action predicated upon the manufacturer's negligence "unknown to admiralty until relatively recent times").

III.

The Opinion Of The Third Circuit In Banc Is Correct

A. The Opinion Of The Third Circuit Exemplifies The Best And Prevailing Rule

The opinion of the Third Circuit in banc follows the majority common law rule as set forth in *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*,[11] 652 F.2d 1165 (3d Cir. 1981). Under this rule, "[t]he gist of a products liability tort case is not that the plaintiff failed to receive the quality of product he expected, but that the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or his property." 652 F.2d at 1169, quoted in *East River*, 752 F.2d at 908, Pet. App. at 10a. *Accord*, *Schiavone Construction Co. v. Elgood Mayo Corp.*, 56 N.Y.2d 667, 451 N.Y.S.2d 720, 436 N.E.2d 1322 (1982), *rev'g* 81 A.D.2d 221, 439 N.Y.S.2d 933 (1st Dept. 1981) (for the reasons stated in the dissent in the Appellate Division); *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982); *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280 (3rd Cir. 1980); *Arrow Leasing Corp. v. Cummins Arizona Diesel, Inc.*, 136 Ariz. 444, 666 P.2d 544 (Ariz. Ct. App. 1983); *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983);

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11 Thus in adopting the majority rule, the Third Circuit faced an entirely different situation from that faced by this Court in *Kermarec v. Campagnie Generale Transatlantique*, 358 U.S. 625 (1959) (Court declines to adopt distinction in duty of care owed a licensee as opposed to an invitee where the common law trend was against such a distinction), cited by petitioners at Pet. 16. Similarly, in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953), cited by petitioners at Pet. 16, the Court held that admiralty law would decline to adopt a "discredited doctrine" barring recovery where there is contributory negligence.

Vulcan Materials Co. v. Driltech, Inc., 251 Ga. 383, 306 S.E.2d 253 (1983).[12]

The same majority rule was properly applied by the Third Circuit under federal maritime law. As the Third Circuit held, there is no basis for a different rule on land or on sea:

> The charterers have not offered, and we do not discern, any persuasive difference between an action which seeks recovery for a defective ship engine and an action which seeks recovery for a defective car engine. In both cases, the law seeks to leave the parties to their bargain, while at the same time protecting consumers of both ships and cars from hazardous defects in the engines.

752 F.2d at 908, Pet. App. at 11a.

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12 Petitioners ignore the decision in *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), which was issued after the Third Circuit's opinion but before they filed their petition. In *Spring Motors*, the Court held that commercial entities, such as petitioners, *see* 752 F.2d at 917 n. 8, Pet. App. at 30a-31a n.8 ("the parties are large corporations who were fully able to protect their respective interests at the time of the purchase of the turbine"), may not recover for qualitative product defects in strict tort liability or negligence, but rather only under their contract remedies as set forth in the Uniform Commercial Code. As *Spring Motors* stated (at 489 A.2d at 671):

> As between commercial parties . . . the allocation of risks in accordance with their agreement better serves the public interest than an allocation achieved as a matter of policy without reference to that agreement. • • • In sum, the U.C.C. represents a comprehensive statutory scheme that satisfies the needs of the world of commerce, and courts should pause before extending judicial doctrines that might dislocate the legislative structure.

Spring Motors substantially limited *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) (recognizing recovery by individual consumer in strict tort liability for aesthetic defects in carpet). Petitioners had relied heavily on *Santor* in the Third Circuit (752 F.2d at 914-15 n.5; Pet. App. at 25a-26a n.5) and the District Court (Pet. App. at 42a-43a) as permitting recovery in tort for qualitative product defects of the type involved in this case.

Indeed, a different rule would lead to arbitrary results which would vary depending, for instance, on whether a manufacturer (even the same manufacturer) happened to make its product (even the same product) for use on land as well as sea.

Protection against the risk of unsatisfactory performance may and should be secured by bargaining for a warranty rather than through tort recovery. *Jones & Laughlin Steel Corp.*, 626 F.2d at 288. Alternatively, one may choose to purchase a product at a lower price and forego the protection of a warranty. *Id.* Similarly, subsequent purchasers may bargain over price and warranty protection. *Id*; *Moorman Manufacturing Co.*, 435 N.E.2d at 448. The risk of loss will be reflected in the cost of the product, and there is no need to assign risks artificially through a non-price mechanism such as tort liability. *Jones & Laughlin Steel Corp.*, 626 F.2d at 288-89; *Moorman Manufacturing Co.*, 435 N.E.2d at 448.

Petitioners contend at Pet. 19-20 that the Third Circuit erroneously relied on *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965) (Traynor, J.) in denying recovery in negligence for qualitative product defects. On the contrary, *Seely* is still good law in California,[13] and was not even mentioned by, much less overruled by, *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60 (1979).[14] Indeed, *J'Aire* was not even a products liability case and did not entail a defective product but was instead a case involving the negligent performance of a construction contract.

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13 *See Sacramento Regional Transit District v. Grumman Flxible*, 158 Cal. App. 3d 289, 204 Cal. Rptr. 736 (1984) (following *Seely*).

14 *Pisano v. American Leasing*, 146 Cal. App. 3d 194, 194 Cal. Rptr. 77 (1983), cited by petitioners at Pet. 20, did not involve a qualitative product defect but rather an allegedly defective sander which damaged wooden cabinets. *Huang v. Garner*, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1984), at Pet. 20, did not involve a defective product. *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984), at Pet. 20, failed to resolve any substantive issues of California tort law but rather considered the duty of counsel to cite *J'Aire* and other cases.

Furthermore, *Seely* exemplifies the majority rule barring the recovery in tort (including negligence) for qualitative product defects; but many other courts do so as well. *See e.g., Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982); *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981) (which petitioners fail to mention although it was frequently cited by the Third Circuit and the District Court). Indeed, the Third Circuit relied on *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 950 (11th Cir. 1982) and *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280 (3d Cir. 1980) for the same point as it cited *Seely*. 752 F.2d at 908-09 n.2, Pet. App. at 12a n.2. Both deny recovery for negligent supervision of the installation of the product concerned, the type of claim made by petitioner Richmond in the fifth count. *Accord, S.M. Wilson & Co. v. Smith International, Inc.*, 587 F.2d 1363 (9th Cir. 1978). *See* Pet. App. at 80a.

B. The Third Circuit Properly Applied The Rule In This Case

Petitioners argue that the District Court "improvidently" granted summary judgment dismissing the claim related to the Stuyvesant. Pet. at 14 n.12. This is not the case. First, despite alleged engine difficulties, there was no injury to persons or other property. Second, the Stuyvesant proceeded successfully on a seven-week voyage, beginning in Alaska, which included a stop in Panama to unload cargo, and then to San Francisco for examination of the vessel's turbine. As the Third Circuit found (quoting the District Court), "any nascent allegations of acute peril to the ship or crew resulting from the turbine defect are belied by the course of action undertaken after the defect manifested itself." 752 F.2d at 909-10 n.3, Pet. App. at 14a n.3.

Also, petitioners' conjectural allegations of peril are based solely upon an unsworn letter which has no evidentiary significance on a motion for summary judgment. Fed. R. Civ. P. 56(c); *Edward B. Marks Music Corp. v. Stasny Music Corp.* 1 F.R.D. 720, 721 (S.D.N.Y. 1941) (Fed. R. Civ. P. 56 requires that facts be contained in affidavits; letters as such are not proper); *accord, Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1300 (D. Del. 1970).

Evidently conceding the lack of peril in the record, petitioners conjure up for the first time in this litigation a wholly irrelevant matter: *viz.*, the possibility of an oil spill and its potential effect on the environment. Pet. at 22. Nothing, not even an unsworn inadmissible document, supports this conjecture; there is no mention of this anywhere in the record; and such imaginary concerns having no connection to this case do not merit the attention of this Court.[15]

Accordingly, summary judgment was properly granted.

C. The Rule Of The Third Circuit Sets The Appropriate Boundary Between Contract And Tort And Properly Preserves The Statutory Scheme Of The Uniform Commercial Code

Petitioners argue that the Third Circuit's decision condones or encourages carelessness on the part of manufacturers and designers of vessels and their components. On the contrary, the decision delineates the appropriate boundaries between the law of contract as set forth by the Uniform Commercial Code[16] (a

15 *In re Oil Spill by The "Amoco Cadiz" Off The Coast of France on March 16, 1978*, 471 F. Supp. 473 (J.P.M.D.L. 1979), cited by petitioners at Pet. 22 from an earlier stage of the *Amoco Cadiz* litigation, does not involve a qualitative product defect but rather a calamitous event (the destruction of a ship caused by the failure of its hydraulic steering gear) and is entirely inapposite. *See generally Amoco Cadiz*, MDL No. 376 (N. D. Ill., April 18, 1984).

16 This case involves the sale of main propulsion units for the construction of ships, and therefore claims by petitioners against Delaval for breach of warranty would be governed by the Uniform Commercial Code. *CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377, 380 n.4 (2d. Cir. 1982); *Owens-Illinois, Inc. v. United States District Court for the Western District of Washington, at Tacoma*, 698 F.2d 967, 970 (9th Cir. 1983). However, as noted *supra* at 6, petitioners withdrew such claims for breach of warranty when they filed their second amended complaint.

matter of state law which is clearly not a concern of this Court) and the law of tort. If tort remedies are not available,[17] then contract remedies are sufficient to ensure adequate performance by manufacturers.[18] The Third Circuit's decision (as does the majority common-law rule) furthers the important interest of preserving the statutory scheme.

Indeed, allowing tort recovery here would inappropriately interfere with the Uniform Commercial Code, which regulates the recovery of losses for defects in quality in commercial transactions. Permitting recovery of such loss here would circumvent the Code's carefully drafted guidelines governing the statute of limitations, disclaimer of warranties and other contractual concerns. *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784, 792-93 (1978) (Uniform Commercial Code contains "comprehensive and finely tuned statutory mechanism" for dealing with the rights of the parties).[19] As noted by the Third Circuit and the majority rule, such recovery is appropriately left to the law of contract.

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17 Petitioners' second "question presented" (*viz.*, whether the Third Circuit's opinion encourages negligence or recklessness) clearly is not a proper question. First, it wrongly implies that the Third Circuit's opinion (which follows the majority rule) threatens public safety. Second, the question is improper as argumentative. S. Ct. R. 21.1(a). Third, since petitioners withdrew all claims alleging negligent design from their complaint, the question appears to have no relevance whatsoever to this case.

18 In fact, petitioners' claims have been described as sounding in contract. *See* 752 F.2d at 911, Pet. App. at 17a (concurring opinion) ("a contract or breach of warranty cause of action should not masquerade in section 402A trappings, particularly in an admiralty context . . . . [I]n these proceedings, the disguise is transparent and has been unmasked in the summary judgment proceedings . . . ."). Thus under the Third Circuit's holding, petitioners might not have been remediless as they claim had they not foregone their remedies for breach of warranty. *See supra* at 6.

19 *Accord, Spring Motors Distributors, Inc. v. Ford Motor Company*, 98 N.J. 555, 489 A.2d 660, 671 (1985) ("application of tort principles would obviate the statutory requirement that a buyer give notice of a breach of warranty . . . . and would deprive the seller of the ability to exclude or limit its liability . . . ."); *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 182 (Minn. 1981) ("Tort theories of recovery would be totally unrestrained by legislative liability limitations, warranty disclaimers and notice provisions. To allow tort liability in commercial transactions would totally emasculate these provisions of the U.C.C."); *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 288 (3rd Cir. 1980) (allowing recovery in tort for qualitative product defects would make manufacturer guarantor of performance of its products through their reasonably productive life and supersede the provision of the Uniform Commercial Code on limitation of warranties); *S.M. Wilson & Co. v. Smith International, Inc.*, 587 F.2d 1363, 1376 (9th Cir. 1978) (parties' rights limited to those provided by Uniform Commercial Code, a body of law designed to deal with commercial disputes); *Gibson v. Reliable Chevrolet, Inc.*, 608 S.W.2d 471, 474 (Mo. App. 1980) (recovery in tort for qualitative product defects would "amount to a judicial assumption of legislative prerogatives" and "vitiate statutory rights found in the law of sales and the Uniform Commercial Code").

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

June 12, 1985

Respectfully submitted,

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JOINT

APPENDIX

No. 84-1726

In The

Supreme Court of the United States

October Term, 1985

EAST RIVER STEAMSHIP CORP., KINGSWAY TANKERS, INC., QUEENSWAY TANKERS, INC., and RICHMOND TANKERS, INC.,

Petitioners,

vs.

TRANSAMERICA DELAVAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 13, 1985
CERTIORARI GRANTED OCTOBER 7, 1985

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RELEVANT DOCKET ENTRIES

Date	Nr.	Proceedings
1-29-80	1	Complaint filed 1-28-80.
1-29-80	2	Notice of allocation and assignment filed. (Trenton - Ackerman)
1-29-80		Summons issued.
2- 5-80	3	Order of Re-Assignment & Re-allocation from Ackerman to Whipple, filed 1-31-80, filed. (Fisher) Notice mailed.
3-14-80	4	Summons returned, served on 3-4-80, filed 3-13-80.
4-15-80	5	Stipulation and order extending time of defendant to answer to 4-24-80, filed 4-14-80. (Whipple) Notice mailed.
5- 8-80	6	Interrogatories of defendant directed to plaintiffs, filed.
5-13-80	7	Stipulation and Order extending time to answer complaint to and including 5-26-80 filed. (Whipple) Notice mailed.
5-19-80	8	Affidavit of service of defendant's first set of interrogatories to plaintiffs, filed.
5-27-80	9	Defendant's request for production of documents filed.
5-30-80	10	Proof of service of defendant's request for production of documents, filed.
6-17-80	11	Stipulation and order extending time of defendants to answer to June 24, 1980, filed 6-16-80. (Whipple) Notice mailed.
6-26-80	12	*Answer* of Delaval Turbine, Inc., filed 6-24-80.
7- 2-80	13	Letter of defendant and corrected proof of service of defendant's request for production of documents, filed 7-1-80.

7-24-80 14 Notice of defendant to take take deposition of American Bureau of Shipping and request for production of documents, filed.

7-30-80 15 Proof of service of a copy of answer of Transamerica DeLaval, Inc., filed 7-28-80.

7-31-80 16 Substitution of Attorney on behalf of defendant filed 7-30-80.

9-11-80 17 Second set of interrogatories of defendant directed to plaintiffs, filed 9-10-80.

9-18-80 18 Consent order extending time for completion of discovery to 1-6-81, filed 9-16-80. (Whipple) Notice mailed.

11-14-80 19 Plaintiffs' answers to defendants first set of interrogatories, filed 11-13-80.

12-10-80 20 Consent order extending completion date for discovery to 4-2-81, filed 12-9-80. (Whipple) Notice mailed.

12-10-80 21 Notice of motion by defendant for order compelling plaintiffs by a date certain to respond to request for production of documents and things and to permit inspection and copying as requested, etc., ret. 1-12-81, statement in lieu of brief and affidavit of service, filed.

1- 5-81 22 Notice of defendant to take deposition of directors, officers, etc. of Alexander and Alexander, Inc. filed 1-2-81.

1-27-81 At call for hearing on motion of defendant for order compelling plaintiffs by a date certain to respond to request for production of documents and things and to permit inspection and copying as requested, etc., court indicated motion withdrawn. (Whipple) (1-26-81)

2- 2-81 23 Notice of defendant, Delaval Turbine, Inc. to take deposition of The Salvage Association, Ltd., filed 1-30-81.

2-17-81 24 Notice of defendant to take deposition of American Petrofina Inc., filed 2-13-81.

2-17-81 25 Notice of defendant to take deposition of Standard Oil Co. d/b/a Sohio Natural Resources Co., filed 2-13-81.

2-18-81 26 Stipulation and order extending time of defendant to answer plaintiffs interrogatories to 4-2-81, filed 2-17-81. (Fisher) Notice mailed.

3- 2-81 27 Notice of defendant to take deposition of Frank B. Hall & Co. of New York, Inc., filed.

3-18-81 28 Notice of defendant to take deposition of Francis A. Martin and Ottawa, Inc., filed.

3-26-81 STATUS CONFERENCE (Whipple) Ordered defendants file motion re jurisdiction forthwith. Ordered time of discovery extended to June 30, 1981. Order to be submitted.

3-30-81 29 Notice of motion by defendant for dismissal of action, ret. 4-27-81 and affidavit of service, filed. (Brief submitted)

3-31-81 30 Order extending time for the completion of discovery thru 6-30-81, filed 3-30-81. (Whipple) Notice mailed.

4- 3-81 31 Notice of defendant,Transamerica Delaval, Inc. to take deposition of plaintiffs by Andrew Garbis filed.

4- 3-81 32 Notice of defendant, Transamerica Delaval, Inc. to take deposition of plaintiffs by Thomas Haller filed.

4- 3-81 33 Notice of defendant, Transamerica Delaval, Inc. to take deposition of plaintiffs by Charles R. Nealis filed.

4- 3-81 34 Notice of defendant, Transamerica Delaval, Inc. to take deposition of plaintiffs by Walter Seales filed.

4- 3-81 35 Notice of defendant, Transamerica Delaval, Inc. to take deposition of plaintiffs by Alfred Case filed.

4- 3-81 36 Notice of defendant, Transamerica Delaval, Inc. to take deposition of plaintiffs by Rufus Cobb filed.

4- 3-81 37 Notice of defendant, Transamerica Delaval, Inc. to take deposition of plaintiffs by Franklin P. Liberty filed.

4- 3-81 38 Stipulation and Order extending time for defendant to respond to plaintiffs' first set of interrogatories to May 30, 1981, filed 4-6-81. (Whipple) Notice mailed.

4- 8-81 39 Third Set of Interrogatories of defendant directed to plaintiff filed.

4-10-81 40 *Amended complaint* filed 4-9-81.

4-10-81 Summons on amended complaint issued. (10 days)

4-13-81 41 Notice of defendant to take deposition of plaintiffs by Harry Decker filed.

4-13 81 42 Notice of defendant to take deposition of plaintiffs by Patrick O'Shea, filed.

4-14-81 43 Notice of defendant to take deposition of plaintiffs by Howard M. Pack, filed.

4-14-81 44 Notice of defendant to take deposition of plaintiffs by Stephen Russell, filed.

4-16-81 Hearing on motion of defendant for dismissal of action. DECISION RESERVED. (Whipple) (4-14-81)

4-24-81 45 Letter Opinion, filed 4-23-81. (Whipple) (denying defendant's motion for dismissal of action and granting plaintiffs' motion to amend the complaint)

4-27-81 46 Order denying defendant's motion to dismiss for lack of jurisdiction and granting plaintiffs' motion to amend the complaint, etc. filed. (Whipple) Notice mailed.

5- 5-81 47 Notice of defendant to take deposition of plaintiffs, filed.

5- 6-81 48 Notice of defendant to take deposition of Arthur Brunelle, filed 5-5-81.

5- 6-81 49 Notice of defendant to take deposition of Kawasaki Heavy Industries Ltd., filed 5-5-81.

5- 7-81 50 Notice of defendant to take deposition of Bay Tankers, filed 5-6-81.

5- 7-81 51 Notice of defendant to take deposition of American Bureau of Shipping, filed 5-6-81.

5-20-81 52 Notice of motion of defendant for summary judgment, returnable 6-8-81; and acknowledgment of service, filed 5-19-81. (Brief submitted)

5-20-81 53 Statement by defendant pursuant to Local Rule 12(f) re genuine issues of fact in dispute, filed 5-19-81.

5-29-81 STATUS CONFERENCE. (Whipple) (5-27-81)

5-29-81 Ordered depositions taken on a day to day basis until completed. (Whipple) (5-27-81)

5-29-81 Ordered status conference continued to 6-25-81. (Whipple) (5-27-81)

5-29-81 Ordered pre-trial conference date fixed for 6-30-81. (Whipple) (5-27-81)

6- 2-81 54 Notice of defendant to take deposition of officer, etc. of General Electric Corp. and for production of documents filed 6-1-81.

6- 3-81 55 First set of interrogatories of plaintiffs, and answers of defendant filed 6-2-81.

6- 8-81 56 Reply affidavit of Robert E. Smith in support of motion for summary judgment, filed 6-5-81.

6- 9-81 Hearing on motion of defendant for summary judgment. (Whipple) (6-8-81) DECISION RESERVED.

6- 9-81 56 Reply affidavit of Robert E. Smith, filed 6-8-81.

6-10-81 57 Notice of defendant to take deposition of Arthur Brunelie, filed 6-9-81.

6-16-81 58 Notice of defendant to take deposition of Cove Shipping, Inc., filed 6-

6-16-81 59 Notice of defendant to take deposition of Andep Steamship Co., filed 6-

6-24-81 60 Notice of defendant to take deposition of plaintiffs, filed 6-23-81.

6-26-81 61 Deposition of Arthur A. Brunelle taken on 6-23-81, filed 6-25-81.

7- 1-81 62 Notice of defendant to take deposition of James Raeside Co. and for production of documents filed 6-29-81.

7- 1-81 63 Notice of defendant to take deposition of an officer, etc. of Triple A Machine Shop Inc. and for production of documents filed 6-29-81.

7- 8-81 64 Notice of defendant to take deposition of officer, etc. of Drew Chemical Corporation and for production of documents filed 7-7-81.

7-10-81 65 Deposition of Aaron Joseph Hammond filed 7-9-81.

7-14-81 66 Notice of motion of plaintiffs for leave to file Second Amended Complaint and to compel defendant to answer certain interrogatories more specifically, returnable 7-27-81 filed 7-13-81. (No brief)

7-29-81 67 Order of re-assignment of Judge H. Curtis Meanor, filed 7-28-81. (Fisher) Notice mailed.

8- 3-81 68 Deposition of Stephen Russell taken on 5-28-81 filed 7-31-81.

8- 3-81 69 Notice of defendant to take deposition of officer, etc., of Anamet Laboratories, Inc. and for production of documents filed 7-31-81.

8- 3-81 70 Deposition of Robert J. Jackson taken on 5-21-81 filed 7-31-81.

8- 4-81 71 Notice of defendant to take deposition of Exxon International Co., filed 8-3-81.

8-17-81 72 Notice of defendant to take deposition of Ernest F. Fullman Inc. filed 8-14-81.

8-17-81 73 Notice of defendant to take deposition of Mechanical Technology Inc. filed 8-14-81.

9- 9-81 74 Notice of motion of defendant for an order pursuant to FRCP 37 compelling plaintiffs to answer certain interrogatories, returnable 9-28-81, statement pursuant to Local Rule 12 G, and acknowledgement of service, filed 9-8-81. (Brief Submitted)

9-17-81 75 Deposition of Drew Chemical Corp., filed.

10-20-81 Hearing on motion of plaintiffs for leave to second amended complaint. Ordered motion granted. Order to be submitted. (Meanor) (10-19-81)

10-20-81 Hearing on motion of defendant for summary judgment. Decision reserved. (Meanor) (10-19-81)

10-23-81 76 Protective Order, filed 10-22-81. (Meanor) Notice mailed.

10-27-81 77 Transcript of hearing taken on 10-19-81, filed.

11- 6-81 78 Order granting plaintiffs' motion for leave to file a second amended complaint; amend-

ing caption, *dismissing* Seatrain Lines, Inc., Seatrain Shipbuilding Corp., Langfitt Shipping Corporation, Tyler Tanker Corp., Polk Tanker Corporation and Fillmore Tanker Corp.; and dismissing East River Steamship Corp., Kingsway Tankers Inc., Queensway Tankers Inc., and Richmond Tankers Inc. all without costs, deeming defendant's pending motion for summary judgment to be against the second amended complaint, and extending time for defendants to answer the second amended complaint for a period of 20 days after service of the second amended complaint or after receipt of order ruling on defendant's motion for summary judgment whichever period is longer, filed 11-4-81. (Meanor) Notice mailed.

2- 3-82 79 Fourth set of interrogatories of defendant directed to the plaintiffs, filed 2-2-82.

4-27-82 80 Second request for production of documents of defendants directed to the plaintiffs, filed 4-26-82.

10- 6-82 81 Opinion, filed 10-5-82. (Granting summary judgment to defendant as to all plaintiffs' claims and expressing no opinion as to other grounds for summary judgment) (Copy to N.J.L.J.)

11-22-82 82 Notice of motion of defendant for reargument of Opinion of 10-5-82, or for certification pursuant to 28 U.S.C. § 1292(b) returnable 12-13-82, and acknoledgment of service, filed 11-18-82. (Brief submitted)

12- 2-82 83 Notice of motion of defendants for reargument of opinion filed 10-5-82, granting defendant's motion for summary judgment, returnable 12-27-82, and affidavit of service, filed 12-1-82. (Brief submitted)

1-11-83 Hearing on motion of defendant for reargument of opinion of 10-5-82, as to Count 5, or for certification pursuant to 28 USC § 1292 (b). Decision reserved. (Meanor) (1-10-83)

1-25-83 84 Supplemental Opinion, filed 1-24-83. (Granting summary judgment in favor of defendants) (Copy to N.J.L.J.)

1-25-83 85 Order granting defendant's motion for summary judgment and dismissing action, with costs, in favor of the defendants Delaval Turbine Inc., now known as Transamerica Delaval Inc., and against the East River Steamship Corp., a New York Corporation; Kingsway Tankers, Inc., a New York Corporation; Queensway Tankers, Inc., a Delaware Corporation; Richmond Tankers, Inc., a Delaware Corporation, filed 1-24-83. (Meanor) Notice mailed.

2-25-83 86 Plaintiffs' notice of Appeal, filed 2-18-83 at 1 p.m.

2-25-83 Copies of plaintiffs' notice of appeal sent to U.S.C.A., Thomas E. Durkin, Jr., Esq., and Kasen & Kraemer, Esqs.

4-11-83 87 Letter reading transcript not necessary for the appeal, filed.

4-11-83 √ *Record Complete for purpose of appeal.*

4-25-83 88 Deposition of Patrick J. O'Shea, filed 4-22-83.

4-25-83 89 Deposition of Charles R. Nealis, filed 4-22-83.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO.

SEATRAIN LINES, INC., a Delaware Corporation; SEATRAIN SHIPBUILDING CORP., a Delaware Corporation; EAST RIVER STEAMSHIP CORP., a Delaware Corporation; KINGSWAY TANKERS. INC., a Delaware Corporation; QUEENSWAY TANKERS, INC., a Delaware Corporation; RICHMOND TANKERS, INC., a Delaware Corporation; LANGFITT SHIPPING CORPORATION, a New York Corporation; TYLER TANKER CORPORATION, a Delaware Corporation; POLK TANKER CORPORATION, a Delaware Corporation; FILLMORE TANKER CORPORATION, a Delaware Corporation,

Plaintiffs

vs

DELAVAL TURBINE, INC., now known as TRANSAMERICA DELAVAL, INC., a Delaware Corporation,

Defendants.

CIVIL ACTION

COMPLAINT

The Plaintiffs complain of the Defendants and state:

JURISDICTION

1. (a) The Plaintiff, Seatrain Lines, Inc., (hereinafter called "Seatrain"), a Delaware Corporation, with its principal place of business in New York, New York, is engaged in the business of building and operating sea-going tankers and the handling and shipment of containerized and bulk cargoes on land and at sea.

(b) The Plaintiff, Seatrain Shipbuilding Corporation, (hereinafter called "Shipbuilding"), a Delaware Corporation, a wholly-owned subsidiary of Seatrain, was engaged at all times material hereto in the business of the building and repair of sea-going vessels.

(c) The Plaintiffs, Queensway Tanekrs, Inc., (hereinafter called "Queensway"), Kingsway Tankers, Inc., (hereinafter called "Kingsway"), East River Steamship Corporation, (hereinafter called "East River"), Richmond Tankers, Inc. (hereinafter called "Richmond") are New York corporations, each of which is engaged in the business of chartering and operating sea-going vessels.

(d) The Plaintiffs, Polk Tanker Corporation, (hereinafter called "Polk"), Tyler Tanker Corporation, (hereinafter called "Tyler"), Fillmore Tanker Corporation, (hereinafter called "Fillmore"), and Langfitt Shipping Corporation, (hereinafter called "Langfitt"), are Delaware corporations engaged in the business of buying, chartering and operating sea-going vessels. "Polk", "Tyler", "Fillmore", "Langfitt" and "Richmond" are all wholly-owned subsidiaries of "Seatrain".

(e) The Defendant, Delaval Turbine, Inc., now known as Transamerica Delaval, Inc., (hereinafter called "Delaval"), is a Delaware Corporation, with its principal place of business in the State of New Jersey.

The amount of controversy exceeds $10,000.00, exclusive of interests and costs. Jurisdiction is founded *inter alia* upon diversity of citizenship pursuant to 28 U.S.C. 1.

ALLEGATIONS COMMON TO ALL CLAIMS AGAINST DELAVAL.

2. During 1969, Shipbuilding announced that it was about to schedule the construction of five Two Hundred and Twenty-five Thousand ton supertankers at its facilities in Brooklyn, New York. Delaval thereafter communicated with Shipbuilding and advised that it, Delaval, was desirous of designing, manufacturing and constructing certain turbine units, which were to be installed in the afore-referred to "supertankers", which said turbine units were to be the power propellants for such ships. In addition thereto, Delaval advised Shipbuilding that it, Delaval, possessed total expertise and ability to properly design, manufacture, construct and supervise the installation of the involved turbines.

2. (a) Thereafter, and predicated upon the expressed and implied representations theretofore made by Delaval to Shipbuilding, a contract was issued by Shipbuilding to Delaval for the design, manufacture and construction of the involved turbines, which said turbines were thereafter installed in the supertankers under the direct supervision of Delaval.

HISTORY OF THE T. T. STUYVESANT, T. T. BROOKLYN, T. T. WILLIAMSBURGH, and T. T. BAY RIDGE.

3. The T. T. STUYVESANT, a 225,000 deadweight ton tanker, was built by the Shipyard under contract with Polk which thereafter transferred title to that tanker to U. S. Trust as trustee for General Electric Credit Corporation which thereafter chartered this said tanker to Queensway under a chartering agreement, which said agreement is incorporated herein as if fully set forth. By and under the agreement of sale and the chartering agreement, Seatrain guaranteed the performance of Queensway.

The construction of the T. T. STUYVESANT was completed proximate to July 1, 1977. It sailed proximate to July 30, 1977 and was delivered to the owner proximate to October 1, 1977.

On December 11, 1977, the T. T. STUYVESANT, while operational and while preparing to make arrangements to enter the Port of Valdez, experienced an unexpected and loud noise which emanated from its engine room. Upon investigation and inspection, it was determined that super heated steam was being emitted from a point where the steam inlet control valve chest is attached to the high pressure turbine casing. The super heated steam, while escaping, created an extremely dangerous condition, more particularly to the ship's personnel. Interim repairs were made upon arrival at Valdez.

After departing from Valdez, with cargo, at appropriate maneuvering speeds, the ship's Master then attempted to increase the ship's speed to normal appropriate sea speed which was made impossible because of the malfunctioning of the ship's turbine.

The T. T. STUYVESANT continued its voyage under these circumstances intending to arrive at an off-loading vessel near Panama. While enroute and when proximate to Long Beach, California, certain technical experts were transferred to the T. T. STUYVESANT so as to review the happenings at Valdez and to conduct an inspection of the involved turbine which was done. The ship continued to Panama, discharged its cargo and the proceeded, unloaded, to a docking at San Francisco, California. Upon this arrival in February of 1978, the involved turbine was "opened up" for a detailed inspection so as to determine the cause of the episode at Valdez and the resultant in-

ability to proceed at proper speeds. Present at this inspection were representatives of the Charterer, Delaval, American Bureau of Shipping and the United States Coast Guard, among others.

This inspection determined that the rotor, thrust and internal stationary parts of the H. P. turbines were in a badly damaged condition, so much so that it was not possible to determine with exactness the actual cause of the casualty.

The damaged parts, now hereinabove referred to, including the H. P. first stage steam reversing blade ring, were removed and were replaced with parts then taken from T. T. BAY RIDGE, which was then under construction at Seatrain's facility in Brooklyn, New York. Upon completion of the involved work, the T. T. STUYVESANT again became operational and returned to sea.

In April 1978, subsequent to, and as a result of the findings of the inspection of the T. T. BROOKLYN and the T. T. WILLIAMSBURGH, which inspections are hereinafter referred to in fuller detail, the T. T. STUYVESANT was again caused to be docked at which time the first stage steam reversing blade ring which had been theretofore taken from the T. T. BROOKLYN and as repaired and modified was installed in the T. T. STUYVESANT as interim or temporary repair.

At the time of this installation, but prior to this installation, an inspection was made of the new parts installed in February 1978 and it was seen and determined that parts of the H. P. first stage steam reversing ring were in fact disintegrating and certain of its parts had

passed through the H. P. turbine rotating and stationary parts.

In August 1978, again at San Francisco, the T. T. STUYVESANT, while docked, again underwent repairs at which time the temporary replacement parts installed in April 1978 were removed and in their stead there was installed a newly designed, constructed and manufactured H. P. first stage steam reversing ring supplied by Delaval, subsequent to which the T. T. STUYVESANT returned to sea.

4. The T. T. WILLIAMSBURGH, a 225,000 deadweight ton tanker, was built by the Shipyard under contract with Tyler which thereafter transferred title to that tanker to Wilmington Trust Co., as trustee for General Electric Credit Corporation, which thereafter chartered this said tanker to Kingsway under a chartering agreement, which said agreement is incorporated herein as if fully set forth. By and under the agreement of sale and the chartering agreement, Seatrain guaranteed the performance of Kingsway.

The construction of the T. T. WILLIAMSBURGH was completed proximate to December 31, 1974 and thereafter delivered to its owner.

In March 1978 and at those times when the inspection and repairs were being made to the T. T. STUYVESANT, and because of dangerous conditions experienced on the T. T. STUYVESANT, it was determined in the interest of safety and caution that inspection should be made of the H. P. turbine of the T. T. WILLIAMSBURGH which was done upon the ship's docking at Europort, Rotterdam, The Netherlands. This inspection and examination deter-

mined that the first stage steam reversing blade ring was in the process of falling apart and that disintegrating parts of this ring had passed through the H. P. turbine's rotating and stationary parts. The damage as seen to the turbine on the T. T. WILLIAMSBURGH was to a varying degree the same type of damage as was viewed on the involved turbine on the T. T. STUYVESANT. The defective first stage steam reversing blade ring was removed and was repaired and strengthened at the Verolme Shipyard at Rotterdam at the direction of and under the supervision of Delaval. This repaired and strengthened ring, as an interim fix, was then installed in the T. T. WILLIAMSBURGH.

In September 1978, while at anchorage at Elefsis, Greece, there was removed from the T. T. WILLIAMSBURGH the ring which was installed in the T. T. WILLIAMSBURGH in April 1978 and in its stead there was installed a newly designed, constructed and manufactured H. P. first stage steam reversing ring supplied by Delaval subsequent to which the T. T. WILLIAMSBURGH returned to sea.

5. The T. T. BROOKLYN, a 225,000 deadweight ton tanker, was built by the Shipyard under contract with Langfitt which thereafter transferred title to that tanker to Wilmington Trust Co., as trustee for General Electric Credit Corp., which thereafter chartered this said tanker to East River under a chartering agreement, which said agreement is incorporated herein as if fully set forth. By and under the agreement of sale and the chartering agreement, Seatrain guaranteed the performance of East River.

The construction of the T. T. BROOKLYN was completed proximate to December 31, 1973 and thereafter delivered to its owner.

In March 1978 and at those times when the inspection and repairs were being made to the T. T. STUYVESANT, and because of dangerous conditions experienced on the T. T. STUYVESANT, it was determined in the interest of safety and caution that inspection should be made of the H. P. turbine of the T. T. BROOKLYN which was done while vessel was at anchorage at Elefsis, Greece. This inspection and examination determined that the first stage steam reversing blade ring was in the process of falling apart and that disintegrating parts of this ring had passed through the H. P. turbine's rotating and stationary parts. The damage as seen to the turbine on the T. T. BROOKLYN was to a varying degree the same type of damage as was viewed on the involved turbine on the T. T. STUYVESANT. The defective first stage steam reversing blade ring was removed, shipped to and was repaired and strengthened at the Triple A Shipyard at Hunters Point, San Francisco, California, under the recommendation and direction of and under the supervision of Delaval. This repaired and strengthened ring, an interim fix, was then installed in the T. T. STUYVESANT in the latter part of April 1978. The defective first state steam reversing ring removed from the T. T. STUYVESANT in April of 1978 was then shipped to Delaval, Trenton, New Jersey for strengthening and repairs and upon completion was sent to and installed in the T. T. BROOKLYN at Elefsis. Greece in early June 1978 as an interim fix.

In August of 1978, a newly designed, constructed and manufactured first stage steam reversing ring was sup-

plied by Delaval and shipped to and installed in the T. T. BROOKLYN in August of 1978, subsequent to which the T. T. BROOKLYN returned to sea.

6. The T. T. BAY RIDGE, a 225,000 deadweight ton tanker, was built by Shipbuilding for and under contract with Fillmore which thereafter transferred title to such tanker to U. S. Trust Company as trustee for Security Pacific Bank and American Road Equipment Corporation which thereafter chartered this said tanker to Richmond Tankers, Inc., whose performance under the terms of the said chartering agreement was guaranteed by Seatrain.

7. At all times relevant hereto, Delaval held itself out to be a leader in the turbine manufacturing industry and as having expertise in the design, manufacture, construction and installation of turbines essential to the proper operation of the aforesaid supertankers. In reliance upon Delaval's representations, as to its experience, skill and judgment in the design of turbine units, Shipbuilding agreed to purchase from Delaval those involved turbines which were designed, manufactured and constructed by Delaval.

8. As the direct and proximate result of the representations theretofore made by Delaval to Shipbuilding and Shipbuilding's agreeing to purchase the said turbines from Delaval, Delaval thereafter did design, manufacture, construct and supervise the installation of the involved turbines as installed in the afore-referred to supertankers.

9. At the times Delaval made the afore-referred to representations to Shipbuilding, i.e., that it, Delaval, possessed the experience, skill and expertise necessary to design, manufacture and construct the involved turbines,

it, Delaval, knew, or in the exercise of reasonable care should have known, that:

(a) the supertankers for which the turbines were being designed, constructed and manufactured were intended to transport large quantities of liquids and other commodities, including oil;

(b) the commercial operation of the ships by the Plaintiffs would be dependent upon the safe, reliable and overall satisfactory operation of said turbine units;

(c) any inadequate, defective, or otherwise unsatisfactory turbine could cause serious injury to persons and/or property;

(d) the reliability and durability of the turbines were of utmost importance inasmuch as these turbines were the sole source of power required to propel and power the involved supertankers;

(e) any inadequate, defective or otherwise unsatisfactory equipment supplied by Delaval would have to be repaired, replaced or modified, causing delay and additional expense, as well as disruption of business;

(f) that to repair or modify the defective turbine installation would take the ships out of service for considerable periods of time;

(g) The salability of such ships by Shipbuilding and the thereafter use of such ships, each of them and all of them, by the owner or charterer would be materially dependent upon the safe, reliable and overall satisfactory operation of said turbine units.

FIRST COUNT

10. The Plaintiffs repeat and reallege the allegations heretofore set forth and incorporate them as if fully set forth herein.

11. The failure of Delaval to furnish adequate, satisfactory and safe turbine units constituted a breach of Delaval's obligations pursuant to its agreement and resulted in extensive damage and great expense to the Plaintiffs.

12. As a result of Delaval's breach of contract, as aforesaid, the plaintiffs have sustained and will continue to incur, *inter alia*, the damages and injuries as alleged herein.

WHEREFORE, Plaintiffs demand judgment against Delaval for damages, costs of suit, interest and such other relief as the Court deems just in the premises.

SECOND COUNT

13. Plaintiffs repeat and allege the allegations heretofore set forth and incorporate them as if fully set forth herein.

14. By virtue of its contract with Shipbuilding, Delaval expressly warranted, *inter alia*:

(a) That in the design, manufacture, construction and installation of the turbines, all equipment and/or services rendered would be free from all and any defects in design, material and workmanship, including but not limited to first class workmanship throughout and materials and equipment of new and the best commercial quality for this class of work.

(b) That the turbines performance, characteristics, design, criteria and materials would be in conformity with the representations as made, which representations were relied upon by Shipbuilding, and which representations caused Shipbuilding to award this contract to Delaval,

(c) That the turbine units would be of modern design and suitable for the safe and efficient operation of the sea-going vessels aforesaid; and,

(d) That the design and specifications as determined by Delaval would assure that all material and equipment made pursuant to the design and specification would be suitable for continuous service and future performance for the useful life of the vessels,

15. In consequence of its failure to perform the contract in the manner specified, as aforesaid, Delaval breached its express warranty to Shipbuilding,

16. As a result of Delaval's breach of express warranties, the Plaintiffs suffered, and will continue to suffer the damages alleged herein.

WHEREFORE, the Plaintiffs demand judgment against Delaval for damages, cost of suit, interest and such other relief as the Court deems just in the premises.

THIRD COUNT

17. The Plaintiffs repeat and allege the allegations heretofore set forth and incorporate them as if fully set forth herein.

18. In promoting the sale and as a result of the actual sale of the turbine units to Shipbuilding, Delaval warranted *inter alia*:

(a) That the turbine units were reasonably fit for the ordinary and usual purposes to which such turbine was intended to be put, which said purpose was well known to Delaval at the time they sought this contract,

(b) That the turbine units would be free from defect, and,

(c) That the turbine units were fit for the particular purposes to which Shipbuilding intended to use them, which said purposes were known by Delaval and fully understood by Delaval,

19. The turbines sold by Delaval and delivered to Shipbuilding were among other things defective, unsafe, not fit for their ordinary purposes, unmerchantable and unsuitable for the particular purpose for which they were purchased.

20. By virtue of the defects, lack of merchantability and unsuitability for their particular purpose, Delaval breached its implied warranties.

21. In consequence of Delaval's breach of its implied warranties, as aforesaid, the plaintiffs sustained and will continue to sustain among other things, the damage and injuries as alleged herein.

WHEREFORE, the Plaintiffs demand judgment against Delaval for damages, cost of suit, interest and such other relief as the Court deems just in the premises.

FOURTH COUNT

22. The Plaintiffs repeat and reallege the allegations heretofore set forth and incorporate them as if fully set forth herein.

23. It thereby became and was the responsibility and duty of Delaval to design, test, inspect, manufacture, construct and install the involved turbines and all parts thereof, in a safe and proper manner, so that such turbines would be reasonably free of defects and changes and so as not to be dangerous to persons and property.

24. Notwithstanding and disregarding its duty aforesaid, Delaval negligently, carelessly and improperly designed, constructed and manufactured such turbines, more particularly the first stage reversing ring, so that as the direct and proximate result of its said negligence and carelessness, the said first stage reversing ring was caused to disintegrate and break, thereby causing damage to the involved turbines and thereby created a danger to persons and property as is herein set forth.

25. In addition to the negligence heretofore set forth, Delaval also negligently, carelessly and improperly inspected and tested the involved turbines, including the first stage reversing ring.

26. As the direct and proximate result of its negligence as aforesaid, the Plaintiffs were caused and will be hereafter required to expend large and considerable sums of monies to remedy and rectify the improper, dangerous and unsafe condition caused by Delaval, all of which is to the damages of the Plaintiffs.

WHEREFORE, the Plaintiffs demand judgment against Delaval for damages, cost of suit, interest and such other relief as the Court deems just in the premises.

FIFTH COUNT

27. The Plaintiffs repeat and reallege the allegations heretofore set forth and incorporates them as if fully set forth herein.

28. Delaval knew or should have known, that its failure to design, test, inspect, manufacture, construct and install the turbines in accordance with its representation as relied upon by Shipbuilding would result in the delivery to, and use by, Shipbuilding of a defective product.

29. Delaval further knew or should have known, that by virtue of its failure to adhere to and meet the specifications incorporated within and made a part of the contract that the material utilized in manufacturing the turbines and component parts thereof, did not meet its required representation and specifications.

30. Delaval knew or should have known that by failure to adhere to and meet its representations that materials utilized in manufacturing the turbines and component parts thereof would result in a defective turbine and would create a condition dangerous to persons and property.

31. As the direct and proximate result of the conduct of Delaval, the turbine units were defective, incapable of performing their ordinary and intended functions and were unreasonably dangerous to persons and property.

32. In consequence thereof, the Plaintiffs sustained and will continue to sustain, *inter alia*, the damages and injuries alleged herein.

WHEREFORE, the Plaintiffs demand judgment against Delaval for damages, cost of suit, interest and such other relief as the Court deems just in the premises.

SIXTH COUNT

33. The Plaintiffs repeat and reallege the allegations heretofore set forth and incorporate them as if fully set forth herein.

34. As a result of the "incident" experienced by the T.T. STUYVESANT on December 11, 1977 and the review and inspection then made upon the high pressure turbines as installed in the T.T. BROOKLYN, T.T. WILLIAMSBURGH and the T.T. BAY RIDGE, which incident and subsequent inspections established the dangerous conditions heretofore described, the Plaintiffs were forced and compelled to expend substantial sums of money to repair the defective and damaged turbines and to rectify and remedy the resultant dangerous condition.

35. The obligations as undertaken by the Plaintiffs to remedy, repair and rectify the afore-referred to defects and dangerous condition was directly and proximately caused by Delaval's breach of contract, breach of expressed and implied warranties, negligence and Delaval's duty as imposed in strict liability in tort.

WHEREFORE, the Plaintiffs demand judgment against Delaval for damages, cost of suit, interest and such other relief as the Court deems just in the premises.

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Thomas E. Durkin, Jr.
Attorney for the Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-238

ANSWER

SEATRAIN LINES, INC., et al.,

Plaintiffs,

-against-

DELAVAL TURBINE, INC., now known as TRANSAMERICA DELAVAL, INC., a Delaware Corporation,

Defendant.

Filed June 24, 1980

Defendant Delaval Turbine, Inc. now known as Transamerica Delaval, Inc. ("Delaval") for its answer to the Complaint herein:

1. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations of Complaint Paragraph ("Paragraph") 1(a) through (e), except admits that defendant is a Delaware Corporation with its principal place of business in the State of New Jersey.

2. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2, except admits that Delaval was desirous of designing, manufacturing and constructing turbines to be installed in ships and that it was fully capable of doing so.

3. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2(a), except denies that Shipbuilding issued a contract to Delaval and that Delaval directly supervised the

installation of the turbines in the supertankers, and admits that a contract was issued for the manufacture of the turbines and that Delaval provided such supervisory services as were required by contract.

4. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3, subparagraphs (a), (b), (c), (d) and (e) (Paragraphs within Paragraphs of the Complaint shall be referred to as "subparagraphs", and subparagraphs shall be designated (a), (b), (c), etc. starting with the first paragraph within each Paragraph, whether or not so designated in the Complaint), except admits that about February 1978, a representative of Delaval was present at an inspection in San Francisco of one of the Stuyvesant's turbines.

5. Denies each and every allegation of Paragraph 3(f), except admits that the turbine inspected was in a badly damaged condition.

6. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3(g), (h), (i), and (j), except admits that Delaval supplied a new first stage steam reversing ring (hereafter referred to in the Answer as "guide bucket ring") for the Stuyvesant.

7. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4, except admits that Delaval supplied a new guide bucket ring for the Williamsburgh.

8. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5, except admits that Delaval recommended re-

pair of a guide bucket ring from the Brooklyn at the Triple A Shipyard at Hunters Point, San Francisco, California; that a guide bucket ring removed from the Stuyvesant was shipped to Delaval, in Trenton, New Jersey for strengthening and repairs and the repairs were completed; and that Delaval supplied a new guide bucket ring for the Brooklyn.

9. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 6.

10. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7, except admits that Delaval is a leader in the turbine manufacturing industry and has expertise in the design, manufacture, construction and installation of turbines.

11. Denies each and every allegation of Paragraph 8, except admits that Delaval designed and manufactured turbines for the Stuyvesant, Williamsburgh, Bay Ridge and Brooklyn which were installed in these ships, and that Delaval provided such supervisory services as were required by contract.

12. Denies each and every allegation of Paragraph 9.

13. Repeats Answer Paragraphs 1 through 12 with respect to Complaint Paragraph 10.

14. Denies each and every allegation in Paragraphs 11 and 12.

15. Repeats Answer Paragraphs 1 through 14 with respect to Complaint Paragraph 13.

16. Denies each and every allegation of Paragraphs 14 through 16.

17. Repeats Answer Paragraphs 1 through 16 with respect to Complaint Paragraph 17.

18. Denies each and every allegation of Paragraphs 18 through 21.

19. Repeats Answer Paragraphs 1 through 18 with respect to Complaint Paragraph 22.

20. Denies each and every allegation of Paragraphs 23 through 26.

21. Repeats Answer Paragraphs 1 through 20 with respect to Complaint Paragraph 27.

22. Denies each and every allegation of Paragraphs 28 through 32.

23. Repeats Answer Paragraphs 1 through 22 with respect to Complaint Paragraph 33.

24. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 34.

25. Denies each and every allegation of Paragraph 35.

FIRST AFFIRMATIVE DEFENSE

26. All causes of action are barred by the applicable statutes of limitations.

SECOND AFFIRMATIVE DEFENSE

27. Upon information and belief, plaintiffs failed to mitigate the damages which were allegedly sustained by them.

THIRD AFFIRMATIVE DEFENSE

28. Upon information and belief, the damages alleged in the Complaint are in whole or in part attributable to plaintiffs' product misuse, maloperation of the vessels, failure to follow instructions and to seek appropriate advice in relation thereto, violation of regulations, and other culpable conduct, including contributory negligence and assumption of risk.

FOURTH AFFIRMATIVE DEFENSE

29. The causes of action are barred by the terms of the contract with respect to the turbines (the "Contract"), which explicitly excluded all express and implied warranties not there stated and limited Delaval's liability to repair and replacement of equipment which may have been proved defective because of design, material or workmanship under the terms of a written guarantee, which, at all times relevant to this action, was no longer in force.

FIFTH AFFIRMATIVE DEFENSE

30. Plaintiffs are barred by the Contract from recovering consequential or like damages against Delaval, including loss of revenue or profit.

SIXTH AFFIRMATIVE DEFENSE

31. Upon information and belief, some or all plaintiffs lack standing to bring this action and are not properly before the Court.

SEVENTH AFFIRMATIVE DEFENSE

Upon information and belief, some or all plaintiffs are foreign corporations which may not validly maintain this action in the State of New Jersey.

EIGHTH AFFIRMATIVE DEFENSE

Some or all plaintiffs are not in privity of contract with Delaval and are therefore barred from recovery.

WHEREFORE, defendant demands that the Complaint be dismissed and that it be awarded the costs and disbursements of this action.

Dated: June 24, 1980

BACKES, WALDRON & HILL

By /s/

A Member of the Firm
28 West State Street
Trenton, N. J.
(609) 396-8256

GUGGENHEIMER & UNTERMYER
Attorneys for Defendant Delaval
Turbine, Inc., now known as
Transamerica Delaval Inc.

80 Pine Street
New York, N. Y. 10005

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 80-238

(Hon. Lawrence A. Whipple)

SEATRAIN LINES, INC., a Delaware Corporation; SEATRAIN SHIPBUILDING CORP., a Delaware Corporation; EAST RIVER STEAMSHIP CORP., a Delaware Corporation; KINGSWAY TANKERS, INC., a Delaware Corporation; QUEENSWAY TANKERS, INC., a Delaware Corporation; RICHMOND TANKERS, INC., a Delaware Corporation; LANGFITT SHIPPING CORPORATION, a New York Corporation; TYLER TANKER CORPORATION, a Delaware Corporation; POLK TANKER CORPORATION, a Delaware Corporation; FILLMORE TANKER CORPORATION, a Delaware Corporation,

Plaintiffs,

vs.

DELAVAL TURBINE, INC., now known as TRANSAMERICA DELAVAL, INC., a Delaware Corporation,

Defendant.

AMENDED COMPLAINT

The Plaintiffs herewith amend the Complaint heretofore filed in the within action pursuant to the Federal Rules of Civil Procedure Rule 15 and Rule 9(h) Admiralty and Maritime Claims as follows:

1. The Plaintiffs hereby amend Paragraph 1 (e) set forth in the Complaint heretofore filed and assert that the relief sought is within the admiralty and maritime jurisdiction of this court as more particularly described in the complaint.

/s/ THOMAS E. DURKIN, JR.
Attorney for the Plaintiffs
50 Park Place
Dated: April 8, 1981 Newark, New Jersey 07102
(201) 623-8368

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-238

(Hon. Lawrence A. Whipple)

SEATRAIN LINES, INC., a Delaware Corporation; SEATRAIN SHIPBUILDING CORP., a Delaware Corporation; EAST RIVER STEAMSHIP CORP., a Delaware Corporation; KINGSWAY TANKERS, INC., a Delaware Corporation; QUEENSWAY TANKERS, INC., a Delaware Corporation; RICHMOND TANKERS, INC., a Delaware Corporation; LANGFITT SHIPPING CORPORATION, a New York Corporation; TYLER TANKER CORPORATION, a Delaware Corporation; POLK TANKER CORPORATION, a Delaware Corporation; FILLMORE TANKER CORPORATION, a Delaware Corporation,

Plaintiffs,

— against —

DELAVAL TURBINE, INC., now known as TRANSAMERICA DELAVAL, INC., a Delaware Corporation,

Defendant.

TO: Law Offices of
THOMAS E. DURKIN, JR., ESQ.
Attorney for Plaintiffs
50 Park Place
Newark, New Jersey 07102

NOTICE OF MOTION
FOR SUMMARY JUDGMENT
PURSUANT TO
FED.R.CIV.P. 56(b)

PLEASE TAKE NOTICE that upon the affidavit of Robert E. Smith, sworn to on May 18, 1981 and the exhibits annexed thereto and the pleadings and the prior proceedings herein, defendant will move in this Court, before the Honorable Lawrence A. Whipple, at the United

States Courthouse, Newark, New Jersey, on June 8, 1981 at 10:00 a.m. or as soon thereafter as counsel can be heard, for an order granting defendant summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure and dismissing this action on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law.

Dated: May 18, 1981

KASEN AND KRAEMER
A Professional Corporation

By /s/ Waldron Kraemer
1180 Raymond Boulevard
Newark, New Jersey 07102
(201) 624-5701

GUGGENHEIMER & UNTERMYER
80 Pine Street
New York, New York 10005
(212) 344-2040
Attorneys for Defendant
Delaval Turbine, Inc.,
now known as Transamerica
Delaval, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-238

(Hon. Lawrence A. Whipple)

SEATRAIN LINES, INC., a Delaware Corporation; SEATRAIN SHIPBUILDING CORP., a Delaware Corporation; EAST RIVER STEAMSHIP CORP., a Delaware Corporation; KINGSWAY TANKERS, INC., a Delaware Corporation; QUEENSWAY TANKERS, INC., a Delaware Corporation; RICHMOND TANKERS, INC., a Delaware Corporation; LANGFITT SHIPPING CORPORATION, a New York Corporation; TYLER TANKER CORPORATION, a Delaware Corporation; POLK TANKER CORPORATION, a Delaware Corporation; FILLMORE TANKER CORPORATION, a Delaware Corporation,

Plaintiffs,

— against —

DELAVAL TURBINE, INC., now known as TRANSAMERICA DELAVAL, INC., a Delaware Corporation,

Defendant.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ROBERT E. SMITH, being duly sworn, deposes and says:

1. I am a member of the firm of Guggenheimer & Untermyer, which along with the firm of Kasen and Kraemer, are attorneys for defendant Delaval Turbine, Inc., now known as Transamerica Delaval, Inc. ("Delaval"). I am fully familiar with the facts and circumstances hereinafter set forth and submit this affidavit in support of

Delaval's motion pursuant to Fed.R.Civ.P. 56(b) for an order granting defendant summary judgment and dismissing the Complaint. The Complaint was filed on January 28, 1980 and served on defendant on March 4, 1980. Delaval's answer was served and filed on June 24, 1980.

2. This action allegedly arises out of the sale of main propulsion turbines by Delaval, whose principal place of business is located in New Jersey, to plaintiff Seatrain Lines, Inc. ("Seatrain"), a corporation whose principal place of business is located in New York, or to plaintiff Seatrain Shipbuilding Corp. ("Shipbuilding"), a wholly-owned subsidiary of Seatrain, whose principal place of business is also located in New York. Complaint ¶ 2; Plaintiffs' Responses to Defendant's Interrogatories ("Pl. Resp. to Def. Int.") #1 (a copy of which is annexed hereto as Exhibit A). The turbines were allegedly installed in four supertankers constructed by Shipbuilding. Complaint ¶ 2. The four vessels were named the T.T. STUYVESANT (the "Stuyvesant"), the T.T. WILLIAMSBURGH (the "Williamsburgh"), the T.T. BROOKLYN (the "Brooklyn") and the T.T. BAY RIDGE (the "Bay Ridge"). Complaint.

3. In December 1977, a few months after the Stuyvesant was allegedly completed, the high pressure turbine of the Stuyvesant allegedly malfunctioned near the port of Valdez, Alaska. Complaint ¶3, p. 3. Interim repairs were allegedly made upon arrival at Valdez. *Id.* The tanker proceeded to load cargo, continued from Alaska to Panama, where its cargo was discharged, and then proceeded to San Francisco, California, where it arrived in February 1978. ¶ 3, p. 3-4. Upon inspection in San Francisco, it was allegedly determined that the rotor, thrust and internal

stationary parts of the H.P. turbines were damaged. ¶ 3, p. 4. The damaged parts were allegedly removed and replaced, some repairs being effected in April 1978, and others in August 1978. ¶ 3, p. 4-5.

4. Following the inspection of the Stuyvesant (now several years after the construction of the Brooklyn and the Williamsburgh had been completed), the Williamsburgh and the Brooklyn turbines were allegedly inspected. ¶ 4, p. 5; ¶ 5, p. 6. At these inspections damage to these turbines was allegedly discovered. ¶ 4, p. 5-6; ¶ 5, p. 7. Repairs were allegedly effected on the Williamsburgh and the Brooklyn at various times from March through September 1978. ¶ 4, p. 6; ¶ 5, p. 7.

5. The Complaint alleges five claims against Delaval*. In Count One, the plaintiffs claim that Delaval breached a contract "to furnish adequate, satisfactory and safe turbine units." Count Two is predicated on Delaval's alleged express warranty that, *inter alia*, the design, manufacture, construction and installation of the turbines would be free from any defects and would include "first class workmanship throughout and materials and equipment of new and the best commercial quality for this class of work." Count Three alleges, *inter alia*, that Delaval breached implied warranties of merchantability and suitability for their particular purpose in the sale of the turbines. Count Four alleges that Delaval negligently de-

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* Count Six merely purports to set forth the damages suffered by plaintiffs, and does not allege an independent claim. Accordingly, this motion is not and need not be directed to Count Six, which has no relevance absent the other counts in the Complaint.

signed and manufactured the turbines. Count Five purports to allege a cause of action in strict tort liability.

6. The damages claimed by plaintiffs are limited to economic loss resulting from the failure of the turbines to function properly. The Complaint does not allege any loss of life. The Complaint does not allege personal injury. The Complaint does not allege any damage to the tankers except to the turbines themselves. Instead, plaintiffs seek to recover the "substantial sums of money" expended "to repair the defective and damaged turbines." Complaint ¶ 34. They seek to recover charges for replacement of parts, labor, service representatives, consultants, shipyard services, transportation of parts, loss of time, customs charges and other miscellaneous items, all allegedly sustained or incurred in order to repair the turbines or because of the turbines' failure to function as expected by plaintiffs. (A summary of the damages claimed by plaintiffs, prepared by plaintiffs as part of Pl. Resp. to Def. Int. #57-64, is annexed hereto as Exhibit B).

7. A provision of the written agreement for the sale of the four turbines limited plaintiffs' remedies against Delaval and disclaimed Delaval's liability other than as there set forth. The agreement, which is dated March 18, 1970, recited that it arose following Seatrain's verbal inquiries and discussions at Seatrain's offices in New York. (The agreement is part of Pl. Resp. to Def. Int. #5, and is annexed hereto together with the interrogatory to which it relates as Exhibit C.) This agreement initially encompassed the sale of turbines for the Brooklyn, the Williamsburgh and the Stuyvesant, and was subsequently applied to the sale of turbines for the Bay Ridge. (See purchase order dated July 5, 1973, also part of Pl. Resp. to Def. Int.

#5, a copy of which is annexed hereto as Exhibit D). This limitation provision stated:

> Our quotation is based upon guaranteeing each shipset of equipment for a period of six months after acceptance of the vessel in which it is installed or twelve months after shipment, whichever occurs sooner. The guarantee provides for repair or replacement, f.o.b. Trenton, New Jersey, of equipment which may have been proven defective because of design, material or workmanship; excluding any responsibility for equipment operated outside specified service conditions and in no event shall consequential or like damages be assessed against De Laval including loss of revenue or profit. Said repair or replacement shall be the only liability assessed to De Laval Turbine Inc. The guarantee is valid only when this equipment is installed and initially started under the supervision of a De Laval field engineer and subsequently operated within conditions specified in De Laval instructions. No other warranty expressed or implied is offered. De Laval shall not be liable for any damages due to deterioration during periods of storage by the purchaser prior to operation.

This provision thus offered a limited warranty to plaintiffs:

> Our quotation is based upon guaranteeing each shipset of equipment for a period of six months after acceptance of the vessel in which it is installed or twelve months after shipment, whichever occurs sooner. The guarantee provides for repair or replacement, f.o.b. Trenton, New Jersey, of equipment which may have been proven defective because of design, material or workmanship.

It established this repair or replacement as the purchasers' exclusive remedy:

> Said repair or replacement shall be the only liability assessed to De Laval Turbine Inc.

It disclaimed all other warranties:

> No other warranty expressed or implied is offered.

It also disclaimed liability for consequential or like losses:

> [I]n no event shall consequential or like damages be assessed against De Laval including loss of revenue or profit.

The limited warranty had expired at all times relevant to this action. *See* Plaintiffs' Supplemental Responses to Defendant's Interrogatories ("Pl. Supp. Resp. to Def. Int.") #4. (Plaintiffs' Supplemental Responses to Defendant's Interrogatories are contained in a letter dated December 30, 1980 from James T. Owens, Esq. to Norman L. Greene, Esq., relevant portions of which are attached hereto together with the interrogatories to which they relate as Exhibit E).

8. The turbines for the Brooklyn, Williamsburgh and Stuyvesant were all delivered to Shipbuilding more than five years before this action commenced in January 1980. The Brooklyn turbines were delivered to Shipbuilding in 1971-72. Pl. Supp. Resp. to Def. Int. #4(b) (Exhibit E). The Williamsburgh turbines were delivered to Shipbuilding in 1972-73. *Id.* The Stuyvesant turbines were delivered to Shipbuilding in May 1974. *Id.*

9. Shipbuilding allegedly constructed each tanker at its facilities in Brooklyn, New York under contract with a different separate, wholly-owned subsidiary of Seatrain for each ship. Complaint ¶ 1(d); ¶ 2; ¶ 3, p.3; ¶ 4, p.5; ¶ 5, p. 6; ¶ 6, p. 7. They are: Polk Tanker Corporation

("Polk"), Tyler Tanker Corporation ("Tyler"), Langfitt Shipping Corporation ("Langfitt") and Fillmore Tanker Corporation ("Fillmore"). Complaint ¶ 3, p. 3; ¶ 4, p. 5; ¶ 5, p. 6; ¶ 6, p. 7.* There is no allegation that Shipbuilding ever had any title to the tankers. Each subsidiary had, but subsequently transferred, title to the vessel to its current owner (the "owner").** *Id.* Title for each vessel was transferred to the owner well before any of the material events alleged in the Complaint. *Id.* In particular, the owners received title from the subsidiaries to the Brooklyn, Williamsburgh, Stuyvesant and Bay Ridge, on December 1, 1973, December 1, 1974, August 15, 1977 and March 15, 1979, respectively.*** Pl. Supp. Resp to Def. Int. #3 (Exhibit E). In addition to transferring title, the subsidiaries also assigned to the owners all their rights, title and interest in the above construction contracts with Shipbuilding, including, *inter alia*, the right to accept delivery of the vessel, take title to the vessel and make any claims for damages against Shipbuilding. Construction Contract Amendment and Assignment ¶ 1. (Relevant portions of each Construction Contract Amendment and Assignment, furnished by Plaintiffs in response to defendant's Request for Production of Documents and Things dated May 14, 1980, are attached hereto as Exhibit F). These assignments also occurred before any of the material events alleged in the

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* Each of these Seatrain subsidiaries has its principal place of business in New York. Pl. Resp. to Def. Int. # 1 (annexed hereto as Exhibit A); Pl. Supp. Resp. to Def. Int. # 1 (annexed hereto as Exhibit E).

** None of the owners is named as a plaintiff. The alleged owner of the Stuyvesant is U.S. Trust Company as trustee for General Electric Credit Corp. ("GECC"), of the Williamsburgh and Brooklyn is Wilmington Trust Co. as trustee for GECC, and of the Bay Ridge is U.S. Trust Company as trustee for Security Pacific Bank and American Road Equipment Corporation. Complaint ¶ 3, p. 3; ¶ 4, p. 5; ¶ 5, p. 6; ¶ 6, p. 7.

*** No material events are alleged with respect to the Bay Ridge. *See* ¶ 12 *infra*.

Complaint. The Construction Contract Amendment and Assignments for the Brooklyn, Williamsburgh, Stuyvesant and Bay Ridge are dated December 31, 1973, December 31, 1974, September 30, 1977 and May 17, 1979, respectively.

10. The risk of loss for potential damage to the vessels was clearly allocated between plaintiffs and the owners as well as between plaintiffs and defendant. As part of the agreements to sell and charter these tankers, Seatrain, Queensway Tankers, Inc. ("Queensway"), Kingsway Tankers, Inc. ("Kingsway"), East River Steamship Corp. ("East River") and Richmond Tankers, Inc. ("Richmond") expressly assumed responsibility for the potential failure and repair of the tankers. Queensway, East River, Richmond and presumably Kingsway are Seatrain subsidiaries.* In particular, upon the transfer of title by a subsidiary plaintiff, each of the owners entered into a charter agreement with a charterer (Queensway, Kingsway, East River and Richmond), each of which is a plaintiff. Complaint ¶ 3, p. 3; ¶ 4, p. 5; ¶ 5, p. 6; ¶ 6, p. 7. (Relevant portions of charter agreements, furnished by plaintiffs in response to defendant's Request for Production of Documents and Things dated May 14, 1980, are attached hereto as Exhibit G). The charter agreements required the charterers to maintain and repair the vessels

* The Complaint alleges that Richmond is a wholly-owned subsidiary of Seatrain. Complaint ¶ 1(d). Plaintiffs have stated that Queensway and East River are Seatrain subsidiaries. Plaintiffs' Second Supplemental Responses to Defendant's Interrogatories #1, contained in a letter dated February 6, 1981, from James T. Owens, Esq. to Norman L. Greene, Esq. (relevant portions attached hereto as part of Exhibit H). Queensway, Kingsway, East River and Richmond all have substantially identical officers and directors. Pl. Resp. to Def. Int. #12 (also attached hereto as part of Exhibit H).

and to obtain insurance at their own expense. Charter Agreements ¶¶ 7, 16 (Exhibit G). If damage rendered the vessel unfit for normal use, the charterer was required to pay a specified amount of damages to the owner. Charter Agreements ¶¶ 17, 21.2 (Exhibit G). Each owner simultaneously entered into a guarantee agreement with Seatrain, whereby Seatrain agreed to guarantee, *inter alia*, payments by the charterer to the owner and the charterer's performance of certain covenants with the owner.* Complaint ¶ 3, p. 3; ¶ 4, p. 5; ¶ 5, p. 6; ¶ 6, p. 7. (See relevant portions of guarantee agreements, furnished by plaintiffs as part of Pl. Resp. to Def. Int. # 16, 31, 36, 42, attached hereto as Exhibit I).

11. Seatrain (and related plaintiffs) was at all relevant times a substantial commercial corporation. In the year ended June 30, 1970, when the original agreement with Delaval was negotiated, Seatrain had operating revenues of over $99 million, net income of over $17 million, and total assests of over $332 million. Source: Moody's Transportation Manual, at 1562 (1972) (relevant pages annexed hereto as Exhibit J). As of June 30, 1971, Seatrain (and related plaintiffs) and its vessel-operating affiliates owned or chartered 47 ocean-going vessels. *Id.* Seatrain also had 3,400 employees. *Id.* In the year ended June 30, 1973, just prior to the date of the Bay Ridge purchase order (Exhibit D), Seatrain's assets had climbed to a value of almost $478 million, its revenues were just short of $300 million and

* Independent of its status as guarantor, there is no allegation that Seatrain suffered any loss or held any beneficial or legal interest in the tankers at any relevant time so as to be in a position to suffer loss. *See* Complaint ¶ 3, p. 3; ¶ 4, p. 5; ¶ 5, p. 6; ¶ 6, p. 7.

it had expanded its work force to 5,300 employees. Source: Moody's Transportation Manual, at 1549 (1974) (Relevant pages annexed hereto as Exhibit K).

12. Although plaintiffs now allege over $3 million in damages related to the Bay Ridge sustained in March 1980, P1. Resp. to Def. Int. #57-64 (Exhibit B), the Complaint lacks any allegation of relevant facts whatsoever concerning the Bay Ridge, let alone that the turbines of the Bay Ridge were defective or that the Bay Ridge was ever placed in the water.

13. On the basis of the foregoing facts and Delaval's accompanying memorandum of law, Delaval respectfully submits that this motion for summary judgment should be granted in all respects and the Complaint should be dismissed.

/s/ Robert E. Smith

Sworn to before me this
18th day of May, 1981.

/s/ Virginia Petrick
Notary Public

VIRGINIA PETRICK
Notary Public, State of New York
No. 24-4663635
Qualified in Kings County
Commission Expires March 30, 1982

EXHIBIT A

INTERROGATORIES

1. With respect to each of the plaintiffs; state:

a. the address of the principal place of business; and

b. the names and addresses of each of their divisions.

a) Seatrain Lines, Inc., 1 Chase Manhattan Plaza, New York, New York; Seatrain Ship Building, Inc., 1 Chase Manhattan Plaza, New York, New York; Queensway Tankers, Inc., 2460 Lemoine Avenue, Fort Lee, New Jersey 07024; Cove Shipping, Inc., Wall Street Plaza, New York, New York 10005, Polk Tanker Corporation, 1 Chase Manhattan Plaza, New York, New York; East River Steamship Corporation, 2460 Lemoine Avenue, Fort Lee, New Jersey 07024; Queensway Tankers, Inc., 2460 Lemoine Avenue, Fort Lee, New Jersey 07024.

b) See answer to a.

EXHIBIT B

(S-1)

T. T. STUYVESANT—H. P. TURBINE CASUALTY

H. P. TURBINE CASUALTY—DECEMBER 11, 1977
REPAIRED FEBRUARY 1978

ITEM		AMOUNT
A.	Shipyard bill for H. P. Turbine	
	Seven (7) days services from January 27, 1978 to February 2, 1978 at Triple "A" Shipyard per invoice No. 16617	19,016
	Plus repairs—Per Triple "A" Shipyard invoice No. 16617	84,233
B.	Delaval charges for repair parts	
	Delaval repair parts are as follows per Delaval order No. 873139/654-092	
	(1) One (1) H. P. Turbine rotor complete	510,475
	(2) One (1) set diaphragm (8)	134,400
	(3) One (1) set diaphragm (8)	9,600
	(4) One (1) guide bucket ring	38,800
	(5) One (1)—PM—1126-A thrust bearing	3,200
	(6) One (1) set interstage packing (8)	9,600
	(7) Two (2)—KJ—588 CWJ oil glands	1,900
	(8) Five (5)—H. P. thrust bearing per Delaval invoice No. 8-2017	1,932
C.	Delaval charges for labor	
	Delaval accept H. P. turbine casing from Hull 103 Seatrain Shipyard, installed new rotor, diaphragm, aligned, checked clearances, etc., for reinstallation and operation on Hull 103—per Delaval invoice No. 8-2682 (this amount was included in Seatrain Shipyard bill) ($10,000.00)	Charged on Item (A)

D.	Delaval Service Representatives	
	(1) Mr. Balan—field service representative dates worked Dec. 21, 22, 24 & 31, 1977 invoice No. 3-2751	5,882
	(2) Mr. Balan—field service representative dates worked Jan. 1 to 10, 1978 invoice No. 3-2692	4,451
	(3) Mr. Cox—field service representative dates worked, Jan. 1 to 23 & 27 to Feb. 2, 1978 invoice No. 2-2164	5,378
	(4) Mr. Zachery—field service representative dates worked, Jan. 16 to 19 & 30, 1978 invoice No. 2-2164	1,636
	(5) Mr. Niates—field service representative dates worked, Jan. 30 to Feb. 2, 1978 invoice No. 2-2403	2,812
E.	Other charges	
	(1) Seatrain Shipbuilding—removal of H. P. rotor, thrust, etc., from Hull 103 for installation on the T. T. Stuyvesant in Jan. 1978 per invoice dated Jan. 12, 1978	25,003
	(2) Seatrain Shipbuilding — reinstallation of H. P. turbine rotor to Hull 103 as replacement of previously removed rotor from T. T. Stuyvesant per Seatrain statement of account	43,878
	(3) General Steamship Corp.—charges are as follows per invoice No. 922-18017	
	(a) Pilotage	3,799
	(b) Tug Boats	22,960
	(c) Agency fee	1,535

(d) Launch	208
(4) A.B.S. damage survey, special visits and expenses per invoice No. 361870	1,537
(5) Anamet Metallurgical Research—for professional services and examination of H. P. turbine	3,000*
F. Transportation of parts	
(1) Shipment of parts from Hull 103 from New York to Triple "A" Shipyard, San Francisco per Horizon Air Freight invoice No. 32925	8,120
(2) Shipment of damage rotor assembly from Triple "A" Shipyard, San Francisco to Delaval, Trenton, New Jersey (transportation cost was included in Triple "A" Shipyard invoice No. 16617)	Charged on Item "A"
G. Owner's and other representatives	
(1) Mr. C. R. Nealis—consultant, Cove Shipping Inc. fee and expenses from Jan. 26, 1978 to Feb. 3, 1978	4,233
(2) Mr. L. Weinberg—Port Engineer, Cove Shipping Inc.—fee and expenses from Jan. 26 to Feb. 3, 1978	3,308
(3) Mr. Stanley Christensen—Port Engineer, Cove Shipping Inc.—fee and expenses from Dec. 23, 1977 to Jan. 16, 1978	5,855
(4) Mr. P. O'Shea—service representative—Seatrain Shipbuilding, — fee and expenses from Dec. 22, 1977 to Jan. 12, 1978	8,559
(5) Decker service representative—fee and expenses from Dec. 12, 1977 to Feb. 4, 1978	3,777

(6) James Raeside Co. service fee and expenses at Triple "A" Shipyard on Jan. 29, 1978 and subsequent dates	1,895
(7) Encotech Inc.—fee and expenses in the investigation and resolution of turbine failure problem	16,955
H. Loss of time incurred	
(2) Voyage TC-4, ballast passage, from Jan. 4, 1978 to Feb. 6, 1978 (this includes stop at San Francisco for repairs)	399,421
(3) Deviation at sea on Jan. 26, 1978 and return to original course of Feb. 2, 1978, including fuel and engine stores consumed	6,725
I. Miscellaneous charges	
(1) Gas free vessel for entry into repair area of port	32,100*
(2) Transportation and helicopter service of owner's and other service representatives from Los Angeles to vessel and back on Dec. 25, 1977 per invoices Nos. 77265 and 127727	300
J. Total costs of the above items	
(A) Total cost of shipyard bills	103,249
(B) Total cost of Delaval repair parts	709,407
(C) Total cost of Delaval labor	Charged on Item "A"
(D) Total cost of Delaval representatives	20,159
(E) Total cost of other charges	99,320
(F) Total cost of transportation of parts	8,120
(G) Total cost of owner's and other representatives	44,582

(H) Total cost of loss of time	406,146
(I) Total cost of miscellaneous charges	
(J) GRAND TOTAL	1,390,983

* Estimated Cost

(S-2)

T.T. STUYVESANT—H. P. TURBINE CASUALTY

H. P. TURBINE CASUALTY—DISCOVERED APRIL 1978—REPAIRED APRIL 1978

ITEM	AMOUNT
A. Shipyard bill for H. P. Turbine	
Three (3) days service at Triple "A" Shipyard from April 8, 1978 to April 11, 1978 per Triple "A" invoice No. 16772	11,373
Plus removal of damage H. P. turbine—1st stage, guide ring from T.T. Brooklyn and reinstalled on T. T. Stuyvesant after modification by Delaval, per Triple "A" Shipyard invoice No. 16772	49,111
B. Delaval Field Service Representatives	
(1) Mr. Taylor—field service representative dates worked, March 5 to 7, 1978 invoice No. 3-2691	1,180
(2) Mr. Reese—field service representative dates worked, April 5 to 10, 1978 invoice No. 5-2636	3,463
(3) Mr. Hammond—field service representative dates worked, April 5 to 11, 1978 invoice No. 4-2542	3,801
(4) Mr. Schroppe—field service representative dates worked, April 9 to 17, 1978 invoice No. 5-2304 ($5,728.00)	N.C.

(5) Mr. Schroppe—field service representative dates worked, April 4, 1978 invoice No. 5-2325 ($470.00)	N.C.
C. Other Charges	
(1) General Steamship Corp.—Charges are follows per invoice No. 922-18066	
(a) Pilotage	160
(b) Tug Boats	22,960
(c) Agency fee	1,228
(2) A.B.S. survey and repairs on H.P. turbine damage per invoice No. 362044	234
(3) A.B.S. survey and expenses on H.P. turbine damage per invoice No. 301773	350
(4) A.B.S. examination and expenses on H. P. turbine per invoice No. 301774	65
(5) Lucius Pitkin—analytical metallurgical research—professional services for non-distructive examination on H. P. parts	1,690
D. Transportation of parts	
(1) Shipment made from Pireaus, Greece to New York (by T. T. Brooklyn) one (1) H.P.—1st stage stationary blade—Delaval April 5, 1978 per Orient Express inv. No. 26660	312
(2) Shipment pick-up at J. F. Kennedy Airport one (1) H.P.—1st stage stationary blade—Delaval and reforwarded on next flight to Triple "A" Shipyard, San Francisco on April 6, 1978 per Horizon Air Freight invoice No. 22646	260
(3) Shipment made from New York to Triple "A" Shipyard, San Francis-	

co one (1) H.P.—1st stage stationary blade on April 6, 1978 per Horizon Air Freight invoice No. 31077	409
E. Owner's and other representatives	
(1) Mr. Charles R. Nealis—Consultant, Cove Shipping Inc.—fee and expenses from April 7, to April 12, 1978	2,687
(2) Mr. P. O'Shea—service representative, Seatrain Shipbuilding—fee and expenses from April 7, to April 12, 1978	3,448
(3) James Raeside Co. fee and expenses for attendance of H. P. turbine modification on April 8, 1978 per invoice No. 0413-16)	870
(4) James Raeside Co. fee and expenses for attendance of H.P. turbine failure on April 8, 1978 per invoice No. 0413-(c)	1,455
(5) Decker service representative—fee and expenses from April 9 to 12, 1978	1,858
F. Loss of Time Incurred	
G. Miscellaneous Charges	
Gas free vessel for entry into repair area of port	32,100*
H. Total costs of the above items	
(A) Total cost of shipyard bills	60,484
(B) Total cost of Delaval field service representatives	8,444
(C) Total cost of other charges	26,687
(D) Total cost of transportation of parts	981

(E) Total Cost of owner's and other representatives	10,318
(F) Total cost of loss of time	
(G) Total cost of miscellaneous charges	32,100*
(H) GRAND TOTAL	140,014

* Estimated cost

(S-3)

T. T. STUYVESANT—H. P. TURBINE CASUALTY

H. P. TURBINE CASUALTY—DISCOVERED IN APRIL 1978—PERMANENT REPAIRS—AUGUST 1978

ITEM	AMOUNT
A. Shipyard bill for H. P. turbine	
Fifteen (15) days services from Aug. 13, 1978 through Aug. 25, 1978, per Triple "A" Shipyard invoice No. 17758	Charged on L.P.
Plus repairs—per Triple "A" Shipyard invoice No. 17758	65,881
B. Delaval charges to repair parts	
One (1) new H. P. turbine—1st stage guide bucket ring—design defective parts per Delaval invoice No. 9-2146	38,300
C. Delaval field service representatives	
(1) Mr. Renmers—field service representative dates worked, August 14 to 27, 1978 invoice No. 9-2437	Charged on L.P.
(2) Mr. Williams—field service representative dates worked, August 14 to 27, 1978 invoice No. 9-2437	Charged on L.P.

D. Other charges

General Steamship Corp. per invoice No. 922-18155 (the following charges are included in the L.P. turbine)

(a) Pilotage — Charged on L.P.

(b) Tug Boats — Charged on L.P.

(c) Agency fee — Charged on L.P.

E. Transportation of parts

Shipment made from New York to Triple "A" Shipyard, San Francisco—one (1) new H.P. turbine—1st stage guide bucket ring — 275

F. Owner's and other representatives

(1) Mr. C. R. Nealis—Consultant, Cove Shipping Inc. fee and expenses from Aug. 10 to August 29, 1978 — 6,364

(2) Mr. P. O'Shea—field service representative Seatrain Shipbuilding—fee and expenses from August 10-24, 1978 — 5,889

(3) Decker service representative—fee and expenses from August 7, 1978 to August 27, 1978 — Charged on L. P.

H. Fuel consumed in port

Fuel consumed in port at Triple "A" Shipyard, San Francisco during repair period of H. P. turbine from Aug. 13 to 28, 1978 — Charged on L. P.

I. Miscellaneous charges

Gas free vessel for entry into repair area of port — Charged on L.P.

J. Total costs of the above items

(A) Total cost of shipyard bill — (charges for fifteen (15) days services is included in the L.P. turbine) — 65,881

(B) Total cost of Delaval parts — 38,300

(C) Total cost of Delaval service representatives — Charged on L.P.

(D) Total cost of other charges — Charged on L. P.

(E) Total cost of transportation of parts — 275

(F) Total cost of owner's and other representatives — 12,253

(G) Total Cost of loss of time — Charged on L.P.

(H) Total cost of fuel consumed in port — Charged on L.P.

(I) Total cost of miscellaneous charges — Charged on L. P.

GRAND TOTAL — 116,709

(S-4)

T. T. STUYVESANT—L. P. TURBINE

REPLACEMENT OF DESIGN DEFECTIVE PARTS AUGUST 13, 1978 THROUGH AUGUST 28, 1978

ITEM	AMOUNT
A. Shipyard bill for L. P. turbine	
Fifteen (15) days services for L. P. turbine (this includes H. P. turbine) from Aug. 13, 1978 through Aug. 23, 1978 per Triple "A" Shipyard invoice No. 17758	80,789

Plus repairs—per Triple "A" Shipyard invoice No. 17758	233,718
Minus cost involved with reblading rotor	60,000(—)
B. Delaval charges to modify parts	
(1) Modified one (1) L. P. astern—1st stage guide bucket ring per Delaval invoice No. 9-2080	32,000
(2) Modified one (1) L. P. astern—2nd stage guide bucket ring per Delaval invoice No. 9-2080	46,000
C. Delaval field service representatives	
(1) Mr. Renmers—field service representative dates worked. Aug. 14 to 27, 1978 invoice No. 9-2437	5,874
(2) Mr. Williams—field service representative dates worked, August 14 to 27, 1978 invoice No. 9-2437	6,206
D. Other charges	
General Steamship Corp.—Charges are as follows per invoice No. 922-18155 (this includes the L. P. turbine)	
(1) Pilotage	3,678
(2) Tug Boats	27,030
(3) Agency fee	2,353
(4) Launch hire	225
E. Transportation of parts	
Shipment made from New York to Triple "A" Shipyard, San Francisco on August 10, 1978 per Horizon Air Freight invoice No. 35720	802

F. Owner's and other representatives	
(1) Decker service representative, fee and expenses from August 7 to 27, 1978 (this includes the H. P. turbine)	8,294
G. Loss of time incurred	
Loss of time, during repairs at Triple "A" Shipyard, San Francisco from Aug. 13 to 28, 1978 (this includes loss of time of H. P. turbine)	638,192
H. Fuel consumed in port	
Fuel consumed in port at Triple "A" Shipyard, San Francisco during repairs of H. P. and L. P. turbine from August 13 to 28, 1978	2,686
I. Miscellaneous charges	
Gas free vessel for entry into repair area of port	32,100
J. Total costs of the above items	
(A) Total cost of shipyard bills (this includes services for H.P. turbine, less the cost of reblading rotor	259,507
(B) Total cost of Delaval modified parts	78,000
(C) Total cost of Delaval service representatives	12,080
(D) Total cost of other charges	33,286
(E) Total cost of transportation of parts	802
(F) Total cost of owner's and other representatives	8,294
(G) Total cost of loss of time	638,192
(H) Total cost of fuel consumed in port	2,686
(I) Total cost of miscellaneous charges	32,100*
(J) GRAND TOTAL	1,064,947

* Estimated cost
(—) Subtract cost

(W-1)

T.T. WILLIAMSBURGH—H. P. TURBINE CASUALTY

H. P. TURBINE CASUALTY—1st NOTED IN MARCH 1978 AT VEROLME SHIPYARD, —ROTTERDAM

ITEM	AMOUNT
A. Shipyard bill for H. P. turbine	
Nine (9) days services at Verolme Shipyard, Rotterdam from March 23, 1978 through April 5, 1978 per Velorme invoice No. 230670	50,715
Plus repairs—(part permanent) of H. P. turbine per Verolme invoice No. 230670	43,137
Plus 50% U. S. Customs duty of the above repairs	21,569
B. Other charges	
(1) Van Omeren account in Rotterdam	41,792
(2) Encotech Inc.—(charged on Stuyvesant—Dec. 11, 1977 casualty)	—
C. Turbine service representatives	
(1) Decker service representative—fee and expenses from March 27 to April 8, 1978	5,004
(2) Mr. P. O'Shea—Seatrain Shipbuilding service representative—fee and expenses from March 28, 1978 to April 6, 1978	5,302
D. Owner's representative, A.B.S. and	
(1) Mr. Charles R. Nealis—Consultant Cove Shipping Inc.—fee and expenses from March 27 through April 6, 1978	4,375

(2) Mr. Fred Chu—Port Engineer, Cove Shipping Inc. expenses from March 26 to April 6, 1978	2,226
(3) A.B.S.—Machinery damage survey and expenses per invoice No. RO-9225-S	2,120
F. Miscellaneous charges	
(1) Extra fuel costs caused by loss of efficiency in H. P. turbine, due to damage caused by 1st stage stationary steam reversing ring, first noted March 30, 1978	164,674*
(2) Gas free vessel for entry into repair area of port	32,100*
G. Total costs of the above items	
(A) Total cost of shipyard bills and U.S. Customs duty	115,421
(B) Total cost of other charges	41,792
(C) Total cost of turbine service representatives	10,306
(D) Total cost of owner's representatives, A.B.S.	8,721
(E) Total of vessel and fuel consumed during repairs and deviation	154,085
(F) Total cost of miscellaneous charges	196,774*
(G) GRAND TOTAL	373,014

* Estimated cost

(W-2)

T. T. WILLIAMSBURGH—H. P. TURBINE IN ELEVSIS BAY

RENEWAL OF DESIGN DEFECTIVE PARTS JULY 23rd, 1978 THROUGH SEPT. 16th, 1978

ITEM		AMOUNT
A.	Shipyard bill for H. P. turbine	
	Repairs of H. P. turbine in Eleysis Bay, Greece from July 23, 1978 through Sept. 16, 1978	10,500
	Plus 50% U. S. Customs duty of the above repairs	5,250
B.	Delaval charges to manufacture parts	
	One (1) new design H. P. turbine guide bucket ring, per Delaval invoice No. 9-2147	38,300
C.	Transportation of parts	
	Shipment made from New York to Eleysis, Greece—one (1) new design H. P. turbine guide bucket ring	515
D.	Turbine service representatives	
	Decker service representative—fee and expenses	Charged on L. P.
E.	Owner's representatives, A.B.S.	
	(1) Mr. Charles R. Nealis—Consultant Cove Shipping Inc. fee and expenses	Charged on L. P.
F.	Cost of vessel in lay-up	
	Cost of vessel in lay-up during repairs in Eleysis, Greece	Charged on L. P.
G.	Miscellaneous charges	
	Gas free vessel for entry into repair area of port	Charged on L. P.

H.	Total costs of the above items	
	(A) Total cost of shipyard bill and customs duty	15,750
	(B) Total cost of Delaval to manufacture parts	38,300
	(C) Total cost of transportation of parts	515
	(D) Total cost of turbine service representatives	Charged on L. P.
	(E) Total cost of owner's representatives, A.B.S. and insurance surveyors	Charged on L. P.
	(F) Total cost of vessel in lay-up	Charged on L. P.
	(G) Total cost of miscellaneous charges	Charged on L. P.
	(H) GRAND TOTAL	54,565

(W-3)

T. T. WILLIAMSBURGH—L. P. TURBINE

MODIFICATION OF DESIGN DEFECTIVE PARTS JULY 23rd THROUGH SEPT. 25th, 1978

ITEM		AMOUNT
A.	Shipyard bill for L. P. turbine	
	Removal of two (2) L. P. turbine design defective parts at Eleysis, Greece and reinstallation of same after modification by Delaval	22,500
	Plus 50% U. S. Customs duty of the above repairs	11,250

B. Delaval charges to modify parts	
(1) One (1) L. P. astern—1st stage reversing blade ring	32,000
(2) One (1) L. P. astern—2nd stage reversing blade ring	46,000
C. Transportation of parts	
(1) Shipment made from Eleysis, Greece to New York on Aug. 1, 1978—two (2) L. P. steam reversing ring. Approximate wts. 860 lbs.	1,248
(2) Shipment made from New York to Eleysis, Greece on Sept. 7, 1978—two (2) L. P. turbine steam reversing ring. Approximate weight is 860 lbs.	964
D. Turbine service representatives	
Decker service representative—fee and expenses from July 24 to 29, 1978	6,673
E. Owner's representatives, A.B.S.	
(1) Mr. Charles R. Nealis—Consultant Cove Shipping Inc.—fee and expenses from Sept. 10, 1978 through Sept. 18, 1978	4,750
(2) Mr. E. Stuber—Port Engineer, Cove Shipping Inc.—fee and expenses	N.C.
(3) Mr. Bobby Panagiotidis—Port Engineer Cove Shipping Inc.—fee and expenses	4,200
(4) A.B.S.	574
(5) Salvage Association	N.C.
G. Miscellaneous charges	
Gas free vessel for entry into repair area of port	32,100

H. Total costs of the above items	
(A) Total cost of shipyard bill and U. S. Customs duty	33,750
(B) Total cost of Delaval modified parts	78,000
(C) Total cost of transportation parts	2,212
(D) Total cost of turbine service representatives	6,673
(E) Total cost of owner's representatives, A.B.S.	9,524
(G) Total cost of miscellaneous charges	32,100*
(H) GRAND TOTAL	162,259

* Estimated cost

(W-4)

T. T. WILLIAMSBURGH—H. P. TURBINE REBLADING

H. P. TURBINE CASUALTY—1st NOTED IN MARCH 1980

RENEWAL OF DAMAGE CAUSED BY DEFECTIVE PARTS ACCOMPLISHED IN SAKAIDE, JAPAN FROM DEC. 8, 1979 TO JAN. 24. 1980

ITEM	AMOUNT
A. Shipyard bill for H. P. turbine	
(1) Forty-seven (47) days service	126,830
(2) Plus (+) 50% U. S. Custom duty of the above services	63,415
(3) H. P. turbine reblading	57,000
(4) Plus (+) 50% U. S. Custom duty of the above reblading	28,500

B. Delaval charges for repair parts

(1) 1—Nozzle ring complete KJ-22 HE	19,600
(2) 1—set row 1 stage 1 blading MK-410 X1	69,600
(3) 1—set row 2 stage 1 blading MK-410 GX1	79,900

C. Turbine service representatives

(1) Girman-Delaval field service rep. dates worked Dec. 3, 12 to 28, 1979	9,365
Dates worked Jan. 5 to 15, 1980	10,982
(2) H. Decker—Consultant Engineer dates worked Dec. 8, 1979 to Jan. 24, 1980	14,660
(3) F. Chu—Consultant Engineer dates worked Dec. 8, 1979 to Jan. 24, 1980	16,580

D. Transportation of parts

(1) Delaval freight bills for nozzle ring, 1 set row 1 blading & 1 set row 2 blading from Trenton, N. J. to N. Y. office. Rcd. Nov. 26, 1979	120
(2) Shipment of the above repair parts from N. Y. to Japan, shipped by Horizan Air Freight on Dec. 1, 1980	1,981
(3) Shipment # 14, Delaval Package #13 wt.=71 lbs. Package total wt. 736 lbs. P.O. No. 6119 shipped from N. Y. to Japan on Dec. 9, 1979 by Horizon Air Freight. Total freight bill=$1195.96 10% of bill	120
(4) Shipment # 19 shipped from N. Y. to Japan on Dec. 14, 1979 by Horizon Air Freight. Total freight bill=$518.50 90% of bill	467

E. Other charges

(1) A.B.S.—Damage survey, repairs & expenses	513
(2) Travelling fee for U. S. Coast Guard marine inspector	500
(3) Custom Brokerage, including domestic transportation fee	2,647
(4) Pilotage, tugs charges, launch hire, agency fee, etc.	
(a) Cove Shipping—Statement of account dated Dec. 31, 1979	21,206
(b) Naikai Shipping Co. Ltd.—Statement of account, bill No. 167 dated Jan. 14, 1980	2,260
(c) Dodwell & Co. Ltd. Osaka—Statement of account No. 069.-0013 dated April 24, 1980	16,306
(5) Gas free for entry into repair area of port	
(a) Crew overtime & expenses	30,885
(b) Fuel oil & stores consumed	203,650

F. Total cost of the above items

(A) Total cost of shipyard bills plus (+) U. S. Custom duty	275,745
(B) Total cost of Delaval repair parts	169,100
(C) Total cost of turbine service rep.	51,587
(D) Total cost of transportation of repair parts	2,688
(E) Total cost of other charges	277,967
(F) GRAND TOTAL	$ 777,087

(B-1)

T. T. BROOKLYN—H. P. TURBINE

MODIFICATION OF DESIGN DEFECTIVE PARTS
MARCH 30th THROUGH JUNE 24th, 1978
NOTE: TEMPORARY REPAIRS ONLY

ITEM	AMOUNT
A. Shipyard bill for H. P. turbine	
Removal of defective H. P. turbine guide ring from T. T. Stuyvesant on March 30, 1978 and reinstalled in T. T. Brooklyn at Elevsis Bay, Greece on June 16, 1978 after modification *by Delaval	12,500
Plus 50% U. S. Customs duty of the above removal and reinstallation	6,250
D. Turbine service representatives	
Decker service representative—fee and expenses	N.C.
D. Owner's representatives, A.B.S. and insurance surveyors	
(1) Mr. Bobby Panagiotidis—Port Engineer Cove Shipping Inc.—fee and expenses	Charged on L. P.
(2) A.B.S.	1,000
(3) Salvage Association	N.C.
F. Cost of vessel in lay-up	
Cost of vessel in lay-up during turbine repair period	Charged on L. P.
H. Total costs of the above items	
(A) Total cost of shipyard bill and U. S. Customs duty	18,750

(B) Total cost of Delaval modified parts	27,416
(D) Total cost of turbine service representatives	N.C.
(F) Total cost of vessel in lay-up	Charged on L. P.
GRAND TOTAL	19,750

* Estimated Cost

(B-2)

T. T. BROOKLYN—H. P. TURBINE

RENEWAL OF DESIGN DEFECTIVE PARTS
JULY 10th, 1978 THROUGH AUG. 1st, 1978

ITEM	AMOUNT
A. Shipyard bill for H. P. turbine	
Renewal of H. P. turbine guide ring from July 10, 1978 through Aug. 1, 1978 in Eleysis Bay, Greece	10,500
Plus 50% U. S. Customs duty of the above renewal	5,250
B. Delaval charges to manufacture parts (Permanent)—One (1) new design H. P. turbine stationary guide ring	38,300
C. Transportation of parts	
Shipment made from New York to Eleysis Bay, Greece—One (1) new design H. P. turbine stationary guide ring	420
D. Turbine service representatives	
Decker service representative—fee and expenses	Charged on L. P.
E. Owner's representatives, A.B.S. and insurance surveyors	

	(1) Mr. Bobby Panagiotidis—Port Engineer, Cove Shipping Inc.—fee and expenses	Charged on L. P.
	(2) A.B.S.	Charged on L. P.
	(3) Salvage Association	N.C.
F.	Cost of vessel in lay-up	
	Cost of vessel in lay-up during repairs in Eleysis Bay, Greece	Charged on L. P.
H.	Total costs of the above items	
	(A) Total cost of shipyard bill and U. S. Customs duty	15,750
	(B) Total cost of Delaval manufacture parts	38,300
	(C) Total cost of transportation of parts	420
	(D) Total cost of turbine service representatives	Charged on L. P.
	(E) Total cost of owner's representatives, A.B.S. and insurance surveyors	Charged on L. P.
	(F) Total cost of vessel in lay-up	Charged on L. P.
	(H) GRAND TOTAL	54,470

(B-3)

T. T. BROOKLYN—L. P. TURBINE

MODIFICATION OF DESIGN DEFECTIVE PARTS
APRIL 21st, 1978 THROUGH AUG. 10th, 1978

ITEM		AMOUNT
A.	Shipyard bill for L. P. turbine	
	Removal of design defective parts at Eleysis Bay, Greece and reinstallation of same after modification by Delaval	22,500

	Plus 50% U. S. Customs duty of the above	11,250
B.	Delaval charges to modify parts	
	(1) One (1) L. P. astern—1st stage reversing blade ring	32,000
	(2) One (1) L. P. astern—2nd stage reversing blade ring	46,000
C.	Transportation of parts	
	(1) Shipment made from Eleysis Bay, Greece to New York on May 11, 1978 —two (2) L. P. turbine guide ring	1,451*
	(2) Shipment made from New York to Eleysis Bay, Greece on July 12, 1978 —two (2) modified L. P. turbine guide ring	1,451
D.	Turbine service representatives	
	Decker service representative—fee and expenses from July 18 to 23, 1978	4,067
E.	Owner's representatives, A.B.S. and insurance surveyors	
	(1) Mr. Bobby Panagiotidis—Port Engineer Cove Shipping Inc. fee and expenses	5,400
	(2) A.B.S.	130
	(3) Salvage Association	N.C.
F.	Cost of vessel in lay-up	
	Cost of vessel in lay-up during turbine removal, modification and reinstallation in Eleysis Bay, Greece	857,332
H.	Total costs of the above items	
	(A) Total cost of shipyard bill and U. S. Customs duty	33,750
	(B) Total cost of Delaval modified parts	78,000
	(C) Total cost of transportation of parts	2,902

(D) Total cost of turbine service representatives	4,067
(E) Total cost of owner's representatives, A.B.S. and insurance surveyors	5,530
(F) Total cost of vessel in lay-up	857,332
(G) Total cost of miscellaneous charges	Charged on (B-1)
(H) GRAND TOTAL	981,581

* Estimated cost

(BR-1)

T. T. BAY RIDGE—L. P. TURBINE DAMAGE

Estimated cost of renewal of damaged parts and repair costs and other related expenses including deviation costs when vessel was diverted to Talchauana, Chili for emergency temporary repairs from March 13, 1980 through March 22, 1980

ITEM	AMOUNT
A. Shipyard bill for L. P. turbine	
(1) Twenty-one (21) days services for L. P. turbine base from T. T. Stuyvesant previous repair at Triple "A" shipyard	135,725*
(2) Plus repairs—base from T. T. Stuyvesant previous repair at Triple "A" shipyard	286,46[illegible]
(3) Plus cost involved with reblading	85,000*
(4) Temporary repair cost at Talchauana, Chile per ASMAR attach copy of invoice	52,200
(5) Plus 50% U. S. Custom duty of the above temporary repair at Talchauana, Chile	26,100*

B. Delaval charges for repair parts	
(1) 1-pc. guide bucket ring	88,343
(2) 1-set stage 2 row # 10 astern blade	92,554
(3) 1-set stage 2 row # 11 astern blade	92,554
(4) 1-pc. 2nd stage astern diaphragm	117,106
C. Turbine service representatives	
(1) Delaval blader—fee, overtime and expenses 18 days @ $700.00/day	12,600*
(2) Delaval service representatives—fee overtime & expenses: 21 days @ $700.00/day	14,700*
(3) Decker service representative 21 days @ $400.00/day	8,400*
(4) Port engineer—fee & expenses 21 days @ $400.00/day	8,400*
(5) Mr. Repose—Delaval field service representative at Concepcion, Chile, worked dates 3/17-26/80 per attach invoice No. 4-2487	10,320
Note: Ocean Shipping & Trading Co. refused to pay this invoice since we never request their services for the above turbine damaged, but did notify them that they had the right to attend.	
(6) Decker service representative dates worker 3/17 to 3/22 at Talchauana, Chile 6 days @ $400.00/day	2,400*
D. Transportation of parts	
(1) Shipment of repair parts by Horizon Air Freight from New York to Talchauana, Chile on March 1980 under P.O. Nos. # 461, # 448, # 484	1,553

(2) Shipment of repair parts from New York to shipyard	3,000*
E. Other expenses	
(1) Pilotage, tugs charges, launch hire, agency fee, etc. . . .	30,000*
(2) Gas free vessel for entry into repair area of port	32,000*
(3) Encotech—Investigation services into astern failure, dates worked April 1 to July 15, 1980 per attach invoice	5,143
(4) Western Ocean Services—Custom entry fee and other expenses	5,673
(5) Deviation into Talchauana, Chile and prolongation expenses from March 13, 1980 through March 22, 1980—(10 days)	
(a) Crew-wages & overtime per manning Scale @ $3,439.79 per day	34,397.90
Taxes @ $292.38 per day	2,923.80
Benefits @ $2,178.50 per day	21,785
(b) Extra cost of meals for crew & shore personnels 1374 @ $2.50 per meal	3,435
(c) Extra meals served steward department per statement	947.25
(d) Additional fuel consumed per Chevron, INY. 3,337 bbls. @ $18.31 per bbl.	61,100.47
(e) Fuel consumed during engine trials 10 bbls. @ $18.31 per bbl.	183.10
E. (5)	
(f) Pilotage, tugs charges, agency fee, etc. . . . per statement of account	24,224.21

(g) Cables, telephones, postages and other misc. expenses	2,200*
(6) Loss of vessel's availability for (26) twenty-six days at $48,000 per day operational and finance plus $20,000 per day margin	1,768,000*
F. Total cost of the above items	
(A) Total cost of shipyard bill	585,487
(B) Total cost of Delaval charge of repair parts	390,557
(C) Total cost of turbine service representatives	56,820
(D) Total cost of transportation of parts	4,553
(E) Total cost of other expenses	1,992,013
GRAND TOTAL COST	$3,029,430

* Estimated cost

EXHIBIT C

5. Identify all writings pertaining to the sale of the turbines for each of the four ships, including contracts, offers to sell and buy, purchase orders, and acknowledgments thereof. See all documents attached.

PURCHASE ORDER

SEATRAIN SHIPBUILDING CORPORATION

1 CHASE MANHATTAN PLAZA—N.Y. N.Y. 10005
N. Y. OFFICE (212) 964-3400
CABLES: SHIPTRAMP
BROOKLYN OFFICE: (212) 596-1515

No. 50640

ABOVE NUMBER MUST APPEAR ON ALL PAPERS, INVOICES, PACKAGES AND CORRESPONDENCE RELATING TO THIS ORDER.

INVOICE IN QUADRUPLICATE TO NEW YORK OFFICE

To Mr. Bazzine, N. Y. 964-4930.

DE LAVAL TURBINE INC.
TRENTON, NEW JERSEY.

Date 3/18/70

DEPT.: HULL NO. I AND HULL NO. II.

REQUISITIONED BY: MR. T. HALLER

REQ. NO.: 640.

ATTENTION: B.B. COOK-V.P.

SHIP TO: SEATRAIN SHIPBUILDING CORPORATION, BROOKLYN NAVY YARD, BROOKLYN, N.Y. 11205—BLDG. #292.

DESCRIPTION

FOR: (MAIN PROPULSION UNITS)

Reference (a) DeLaval Proposal (B.B. Cook, Jr.) dated March 18, 1970.

(b) DeLaval Technical Proposal MD 700204 dated March 6, 1970.

1—In accordance with the agreements reached on March 18, 1970, Seatrain Lines, Inc., agrees to purchase from DeLaval Turbine Inc., two (2) main propulsion units in accordance with References (a) and (b) attached hereto and made part of this order.

2—Seatrain Lines, Inc., retains the option to purchase and DeLaval agrees to sell four (4) additional units by dates, and for prices defined in reference (a).

Note: P.O. For Main Prop. Equip. # SSTG

COPY TO MR. T. HALLER.

Remarks: B. HULL 100

W. HULL 101

S. HULL 102

IF TOTAL COST OF PURCHASE EXCEEDS $1000.00 MUST BE COUNTERSIGNED BY AUTHOR IZED SIGNATURE.

AUTHORIZED SIGNATURE

WARREN B. PACK

PURCHASING DEPARTMENT
DEPT. FILE COPY

DE LAVAL
TURBINE INC.

Executive Offices P.O. Box 2705
Trenton, New Jersey 08602 Telephone: 609-587-5000
Cable Address: Turbinco - Trenton

G-50010-17

March 18, 1970

Seatrain Lines Inc.
One Chase Manhattan Plaza
New York, New York

Attention: Mr. H. T. Haller
Vice President of Engineering

Subject: Seatrain Lines Inc.
Bulk Oil Carrier
Main Propulsion Turbines and Gears

Reference:

(a) De Laval Marine Machinery Proposal, MD 70024 dated March 6, 1970, Main Propulsion Turbines and Gears.

Gentlemen:

1. We are pleased to present our proposal for the subject marine equipment in response to your verbal inquiries and

the discussions held in your offices on March 2, 1970 and March 6, 1970.

2. The equipment which we are offering is defined in our technical proposal, Reference (a) and consists of the following components for each vessel:

(a) 1 — Main Propulsion Turbines excluding controls,* but including Reduction Gear and Main Thrust Bearing.

3. Based on an order for two (2) complete shipsets of propulsion units as described in our technical proposal excluding controls,* the price for each shipset is: One million three hundred eighty three thousand dollars ($1,383,000.00) FOB Trenton freight allowed to Brooklyn, New York.

Delivery of the first shipset will be made in the second quarter of 1971 and delivery of the second in October of 1971 based on an order and authorization to proceed by March 20, 1970.

4. We understand you desire to purchase two shipsets at this time, as in Paragraph 3, with option provisions for shipsets 3, 4. 5 and 6. In this event, we are pleased to quote:

(a) Exercise option for shipset 3 by 12/31/70, the price is one million three hundred eighty three thousand dollars, ($1,383,000.00) for delivery in February 1972.

(b) Exercise option for shipset 4 by 12/31/70, the price is one million three hundred eighty three thousand dollars, ($1,383,000.00) for delivery in June 1972.

(c) Exercise option for shipset 5 by 8/31/71, the price is one million four hundred eighty three thousand dollars, ($1,483,000.00) for delivery in October 1972.

(d) Exercise option for shipset 6 by 12/31/71, the price is one million four hundred eighty three thousand dollars, ($1,483,000.00) for delivery in February 1973.

5. All of the above prices are based on payments of the progress type on a shipset basis. In accordance with industry practice, invoices shall be submitted based on progress in amounts not less than $10,000, less 5% retention on the amount certified complete up to 100% of completion. The final 5% will be due and payable at the expiration of the guarantee period for each shipset of machinery.

6. This proposal is valid for sixty days from this date and the quoted prices include materials, engineering, onboard repair parts, special tools and the services of a De Laval field engineer to supervise installation of the main propulsion unit.

7. Our quotation is based upon guaranteeing each shipset of equipment for a period of six months after acceptance of the vessel in which it is installed or twelve months after shipment, whichever occurs sooner. The guarantee provides for repair or replacement, f.o.b. Trenton, New Jersey, of equipment which may have been proven defective because of design, material or workmanship; excluding any responsibility for equipment operated outside specified service conditions and in no event shall consequential or like damages be assessed against De Laval including loss of revenue or profit. Said repair or replacement shall be the only liability assessed to De Laval Turbine Inc. The guarantee is valid only when this equipment is installed and initially started under the supervision of a De Laval field engineer and subsequently operated within conditions specified in De Laval instructions.

No other warranty expressed or implied is offered. De Laval shall not be liable for any damages due to deterioration during periods of storage by the purchaser prior to operation.

8. In the event that this proposal is accepted, the amount taxes on sales, taxes measured by gross receipts from sales, use taxes, transportation taxes or like taxes, which De Laval Turbine Inc. shall now or hereafter be required to pay under present or future laws, either on its own behalf or on behalf of the purchaser or otherwise, with respect to the subject matter covered by this proposal shall be added to the price contained herein or billed as a separate item and paid by the purchaser in the same effect as if added thereto originally.

9. Recognizing the need for timely delivery of the equipment De Laval agrees to pay penalties in the event of default in making delivery on the agreed upon dates and Seatrain agrees to pay bonuses for De Laval's delivery in advance of the agreed upon dates. The agreed on penalties/bonuses shall apply to the delivery dates of paragraphs 3 and 4 (or any extension thereof by mutual agreement or by reason of legitimate delay) referred to as the "Delivery Dates".

De Laval agrees to pay Seatrain an amount of three thousand dollars ($3.000.00) for each day of delay in delivery beyond the Delivery Dates and Seatrain shall pay De Laval an amount of one thousand dollars ($1,000.00) per day for each day of delivery in advance of the Delivery Dates. The maximum penalty or bonus on account of any one unit consisting of propulsion turbines reduction gear and main thrust bearing shall not exceed one hundred fifty thousand dollars ($150,000.00).

The following shall constitute legitimate delay: shutdown of production at De Laval's Turbine Division plant or at the plants of any of De Laval's subcontractors; delays in delivery of components caused by failure of carriers to meet delivery schedule; actions of governmental or regulatory bodies, or of Seatrain or any of its subcontractors, that necessitate delays in production by De Laval or any of its subcontractors; and failure of De Laval to receive notification of Seatrain's approval (such approval not to be unreasonably withheld) or disapproval of drawings submitted for approval, within ten (10) working days after submission thereof to Seatrain. Such delay, however, must be beyond the reasonable control of De Laval and without the fault or negligence of De Laval.

10. We appreciate the opportunity of providing this proposal to Seatrain Lines and believe you will find it completely responsive to your requirements. We look forward to discussion of any items of the proposal at your convenience.

Very truly yours,

DE LAVAL TURBINE INC.

/s/ B. B. Cook, Jr.
Vice President

BBC/JN

*The control system excluded from this Proposal and the Technical Proposal, Reference (b), and not included in the prices quoted is shown on De Laval Drawing C69600 (part of Reference (b)). De Laval will furnish, included in the price of this proposal, only the ahead and astern steam valves with actuators, and a motor operated astern guardian valve.

/s/ B. B. C., Jr.

EXHIBIT D

SEATRAIN SHIPBUILDING
Bldg. 292, Brooklyn Navy Yard
Brooklyn, N.Y. 11205
(212) 596-1515

Domestic Telex: 222740 Foreign Telex: 235570

PURCHASE ORDER NO. 9160
Date: July 5, 1973
Received Sep. 24, 1973

To: De Laval Turbine Division
Box 251
Trenton, New Jersey 08602

Ship Via: Best way.

Date Required: See below. Date Promised: See below.
Furnish us with one shipset of the following:

Item	
1	1 set Turbines, reduction gears, and all associated equipment and parts as furnished to us on our order 50640 including amendments 1 thru 6.
2	2 sets 1750 KW Turbo-generator sets, and all associated equipment and parts, same as furnished on our order 51460 including amendments 1 thru 7.

The terms and conditions set forth in our orders 50640 and 51460, referred to above, apply to each component the same as written herein, except that the provision for penalties and bonuses do not apply to this order.

Required Dates: SSTG Sets — July '74

Promised Date: SSTG Sets — July '74

Required Dates: Turbines — Apr. '74
Red. Gear — Apr. '74
Thrust Brg — Apr. '74

Promised Dates: Thrust Brg — Apr. '74
Turbines — Sept. '74
Red. Gear—Sept. '74

De Laval will do all possible to deliver Main Turbines and Reduction Gear earlier than promised dates above.

Price for items 1 & 2 (one shipset) LOT $2,410,000.00

Attached one-page requirement "Liens & Titles" is a requirement for progress payment and is made a part of this order.

If total cost of purchase exceeds $1,000.00 must be countersigned by authorized signature.

Authorized Signature

/s/ T. P. Howes
President

Buyer
/s/ G. T. Smith
Purchasing Department

EXHIBIT E

3. Identify all owners of the four ships from the initial taking of title through the present, and state the dates of the ownership of each and by what means each took title.

4. For each of the four ships, state the dates and places on which the turbines "sold by Delaval and delivered to Shipbuilding" as alleged in Complaint ¶ 19 were (a) sold, (b) delivered and (c) installed in the ship, including stating who installed each and the dates upon which installation was completed for each.

December 30, 1980

Guggenheimer & Untermeyer, Esqs.
80 Pine Street
New York, New York 10005
Attention: Norman L. Greene, Esq.
Re: Seatrain v. Delaval

Dear Mr. Greene:

This is in reply to your letter of November 20, 1980 requesting supplemental answers to interrogatories heretofore submitted.

Interrogatory No.

1. Richmond Tankers, Inc. principal office is at 2460 Lemoine Avenue, Fort Lee, New Jersey 07024. Langfitt Shipping Corp., Fillmore Tanker Corp. and Tyler Tanker Corp. principal office is the 38th floor, One Chase Manhattan Plaza, New York, New York.

3. This answer states the date of the Bill of Sale for each of the four ships, the chain of title and encumbrances of the four ships is as follows:

Stuyvesant: United States Trust Company of New York, not in its individual capacity but solely as trustee under the trust agreement between it and General Electric Credit Corporation dated as of August 15, 1977.

Williamsburg: Wilmington Trust Company, not in its individual capacity but solely as trustee under the trust agreement between it and General Electric Credit Corporation dated as of December 1, 1974.

Bay Ridge: United States Trust Company of New York (a New York Corporation) not in its individual capacity but solely as owner-trustee under the trust agreement dated as of March 15, 1979 for the benefit of Security Pacific Equipment Leasing, Inc. (a Delaware Corporation) and American Road Equity Corporation (a Delaware Corporation).

Brooklyn: Wilmington Trust Company not in its individual capacity but solely as trustee under the trust agreement between it and General Electric Credit Corporation dated as of December 1, 1973.

A copy of the guaranty and security agreement covering each of the four ships was attached to the interrogatories heretofore served.

4. a) Brooklyn and Williamsburg turbines were sold 3/18/70

Stuyvesant turbines were sold 3/18/70 by exercise of option

Bay Ridge turbines were sold 7/5/73

b) Brooklyn delivered to Seatrain Shipbuilding Corporation 1971-1972

Williamsburg delivered to Seatrain Shipbuilding Corporation 1972-1973

Stuyvesant delivered to Seatrain Shipbuilding Corporation May, 1974

Bay Ridge delivered to Seatrain Shipbuilding Corporation November, 1978

c) Brooklyn installation complete 12/73

Williamsburg installation complete 12/74

Stuyvesant installation complete 8/77

Bay Ridge installation complete 12/78

5. A reading of the documents submitted in answer to this question shows a letter by Delaval over the signature of B. B. Cook. Jr., Vice President in which he presents a proposal to manufacture and supply two complete ship sets of propulsion units for a specific price, wherein he asserts "you will find (them) completely responsive to your requirements." In reply to such proposal, Seatrain issued a purchase order. Also incorporated in this answer are copies of mailgrams sent by Seatrain to Delaval protesting manufacturing cumbersome for easy reference. I believe that could be remedied by breaking down the 65 interrogatories into multiplies of ten. With regard to the numbering of the exhibits, they would be more readily visible if they were numbered at the bottom of the page rather than at the top.

If there is any further information you may require, kindly advise.

These answers may be accepted and used as if sworn to and certified.

Very truly yours,

/s/ James T. Owens

JTO:jb
cc: Kasen & Kramer, Esqs.

Enclosures

22A — Sea Log Engine Department (1 page)

23 A, B, C, D, F — Sea Log Engine Department (2 pages)

42C — Guaranty Agreement dated 3/15/79 by Seatrain Lines, Inc. with United States Trust Company of New York as owner-trustee

56 — U. S. Coast Guard Report of vessel casualty filed for the Stuyvesant dated 1/28/78 and a second filed for the Williamsburg dated 4/5/78

EXHIBIT G

BAREBOAT CHARTER PARTY

Bareboat Charter Party. dated as of August 15, 1977, between United States Trust Company of New York, not in its individual capacity but solely as Owner Trustee (*"Owner"*, which term shall be deemed to refer to any institution serving as a successor trustee pursuant to the terms of the Trust Agreement) under the Trust Agreement, dated as of August 15, 1977 (the *"Trust Agreement"*), between Owner and General Electric Credit Corporation, a New York corporation (the *"Trustor"*), and Queensway Tankers, Inc., a Delaware corporation (*"Charterer"*).

In consideration of the mutual agreements herein, the parties hereto agree as follows:

• • •

7. Maintenance; Classification. Charterer shall have full responsibility for maintenance and repair of the Vessel throughout the Charter Period, and at its expense

(whether or not any applicable insurance proceeds are adequate for the purpose) will (unless otherwise required by any military authority of the United States and except during such period as *(1)* the use or title of the Vessel has been taken or requisitioned by any government or governmental body as contemplated in Section 2.04(b) of Exhibit 1 to the Security Agreement, *(2)* there has been an actual or constructive total loss, or an agreed or compromised total loss of the Vessel or *(3)* there has been any other loss with respect to the Vessel, and Charterer shall not have had a reasonable time to repair the same) *(a)* maintain and preserve the Vessel and her equipment in good running order and repair in accordance with good commercial maintenance practice, so that the Vessel shall be, in so far as due diligence can make her so, tight, staunch, strong and well and sufficiently tackled, appareled, furnished, equipped and in every respect seaworthy and in as good operating condition as when delivered hereunder, ordinary wear and tear excepted, *(b)* except with the express permission of Owner, the Secretary and the Secretary of Commerce during any idle or inactive period, keep the Vessel in such condition as will entitle her to the highest classification and rating by the Classification Society for vessels of the same age, type and use and *(c)* cause the Vessel to be overhauled when necessary and to be drydocked, cleaned and bottom painted when necessary, but at least as often as may be required by applicable United States Coast Guard regulations and by the Classification Society. Charterer shall, promptly after acceptance of the Vessel under this Charter, furnish to Owner, the Mortgagee, the Secretary and the Secretary of Commerce, a Certificate of Classification (or recommendation for classification issued by the Classification Society surveyor) issued by the

Classification Society showing the above-mentioned classification and rating. During each calendar year after the year in which the Vessel is accepted under this Charter, Charterer shall (unless any military authority of the United States requires the above-mentioned classification and rating not to be retained and except during periods as aforesaid) *(1)* furnish to Owner, the Mortgagee, the Secretary and the Secretary of Commerce, a Certificate of Confirmation of Class issued by the Classification Society showing that the above-mentioned classification and rating have been retained and *(2)* promptly furnish to the Owner, the Mortgagee, the Secretary and the Secretary of Commerce copies of all Classification Society reports on annual, other periodic and damage surveys.

• • •

16. Insurance. (a) Charterer shall, at its own expense, keep the Vessel insured against the risks indicated below, in addition to such other risks as Owner, the Trustor, the Secretary and the Secretary of Commerce or any one of them may reasonably specify from time to time, in an amount in dollars (in any coin or currency of the United States which at the time of payment under the policy in question is legal tender for public and private debts) equal to, except as otherwise approved in writing by Owner, the Trustor, the Mortgagee, the Secretary and the Secretary of Commerce, the greatest of 105% of the Stipulated Loss Value for the Vessel (determined as of the Basic Hire Payment Date on or immediately preceding the date of computation or, if there is no such immediately preceding Basic Hire Payment Date, the Delivery Date, but without including any amount equal to premium referred to in Schedule I hereto), 110% of the aggregate un-

paid principal amount of the outstanding Bonds, and Guaranteed Bonds and the Third Mortgage Note or the then full commercial value of the Vessel as determined by the Secretary:

(1) marine and war risk hull and machinery insurance under the latest (at the time of issue or renewal of the policies in question) forms of American Institute of Marine Underwriters' policies approved by Owner, the Trustor, the Mortgagee, the Secretary and the Secretary of Commerce and/or policies issued by or for the Secretary of Commerce (or under such other forms of policies as Owner, the Mortgagee, the Secretary and the Secretary of Commerce may approve in writing) insuring the Vessel against the usual risks covered by such forms (including, at the option of the Charterer, such amounts of increased value and other forms of "total loss only" insurance as are permitted by such hull insurance policies);

(2) (a) marine and war risk protection and indemnity insurance, and (b) insurance against liability arising out of pollution, spillage or leakage, in such forms as Owner, the Trustor, the Mortgagee, the Secretary and the Secretary of Commerce shall approve in writing and in such amounts as are required by the provisions of this Section 16(a) preceding clause (1) of this Section 16(a) or such greater amounts as any of Owner, the Trustor, the Mortgagee, the Secretary or the Secretary of Commerce shall require (but, in the case of any such greater amounts, not in excess of the amounts generally maintained by experienced and responsible companies engaged in the marine transportation of petroleum and related products), which insurance required by this paragraph (2) shall be maintained in a prudent manner and shall be generally comparable to marine insurance practices employed by experienced and responsible companies engaged in the marine transportation of petroleum and related products and protect Owner without limit over and above the collision liability coverage afforded by the

hull insurance "running down" clause, and in no event shall such insurance with respect to oil pollution liability (including clean-up costs) be in an amount less than $30,000,000 per incident without the consent of Owner, the Trustor, the Secretary and the Secretary of Commerce. So long as it is prudent and reasonably possible to do so, the Charterer agrees to maintain membership in the International Tanker Owner's Pollution Federation Ltd. and enroll the Vessel in "Tanker Owner's Voluntary Agreement for Liability for Oil Pollution" (TOVALOP), or any successor thereto or similar association which may be formed in the future and to extend protection and indemnity insurance to include coverage for pollution liability under the Water Quality Improvement Act of 1970 as in force in the United States of America and the Civil Liability Convention adopted in Brussels on November 28, 1969 and any future law or convention which may from time to time apply to the Vessel;

(3) single interest owner's equity insurance covering the Trustor, unless otherwise consented to in writing by the Trustor against in each case any acts or omissions of Charterer whereby any insurance required by this Section 16 shall or may be suspended, impaired or defeated;

(4) while the Vessel is idle or laid up, at the option of Charterer and in lieu of the above-mentioned marine and war risk hull or marine and war risk hull and increased value insurance, port risk insurance under the latest (at the time of issue of the policies in question) forms of American Institute of Marine Underwriters' policies approved by Owner, the Trustor, the Mortgagee and the Secretary and/or policies issued by or for the Secretary of Commerce or under such other forms of policies as Owner, the Trustor, the Mortgagee, the Secretary and the Secretary of Commerce may approve in writing insuring the Vessel against the usual risks covered by such forms;

provided that *(y)* insurance against requisition of title shall in no event be required and *(z)* single interest owner's equity insurance shall be in an amount equal to 105% of the Stipulated Loss Value less the principal and interest on the Outstanding Bonds, the Guaranteed Bonds and the unpaid principal amount of the Third Mortgage Note.

Irrespective of the foregoing, Charterer, with the prior written consent of the Secretary of Commerce, the Secretary, Owner and the Trustor (a copy of which shall be filed by Charterer with Owner, the Trustor, the Secretary of Commerce, the Secretary and the Mortgagee) shall have the right to self-insure up to the first $500,000 of any loss resulting from any one accident or occurrence (other than an actual or constructive total loss of the Vessel) covered under the marine hull and machinery policies.

(b) All policies of insurance under this Section shall, except as provided in subsection (f), provide that *(i)* until the insurers shall have received notice satisfactory to them from the Mortgagee, the Secretary, the Trustor or Owner that no Bonds are Outstanding all losses in excess of $100,000 shall be payable solely to the Mortgagee, *provided* that, in the event the First Mortgage shall have been assigned to the Secretary and the insurers shall have been notified, all losses in excess of $50,000 shall be payable solely to the Secretary, *(ii)* after the Bonds are no longer Outstanding but until the insurers shall have received notice satisfactory to them from the Secretary, the Trustor or Owner that no Guaranteed Bonds are Outstanding, all losses in excess of $100,000 shall be payable solely to the Secretary, *(iii)* after the Bonds and the Guaranteed Bonds are no longer Outstanding but until the insurers shall have received notice satisfactory to them from the Secretary of Commerce, the Trustor or Owner that the Third Mortgage Note has been paid in full (within the meaning of the Third

Mortgage Note) all losses in excess of $100,000 shall be payable solely to the Secretary of Commerce, and *(iv)* after the Bonds and the Guaranteed Bonds are no longer Outstanding and the Third . . .

• • •

(p) The Charterer agrees to send copies of all receipts for payment of insurance premiums, club calls and assessments, if any, with respect to the insurance required by this Section on the Delivery Date and in each calendar year thereafter, and at such other times as the Owner may request.

17. Loss. In the event that *(a)* the Vessel shall become an actual total loss or there is a constructive or an agreed or compromised total loss of the Vessel or *(b)* the Vessel shall sustain damage to an extent which, in Charterer's opinion, as determined in good faith by a duly authorized officer of Charterer, makes repair of the Vessel not economically possible or renders the Vessel permanently unfit for normal use, then Charterer shall give notice thereof as required in Section 15 hereof and, in addition, shall give written notice to Owner (with copies to the Mortgagee, the Secretary of Commerce and the Secretary) of the termination of this Charter on any date occurring not less than 45 days nor more than 150 days after the occurrence of the event giving rise to such constructive, agreed or compromised total loss or of such actual total loss or of such determination, *provided, however,* if the date (the "*Acknowledgement Date*") on which the insurance underwriters acknowledge that the Vessel has become an actual total loss or that there is a constructive, agreed or compromised total loss of the Vessel shall be more than 105 days after the occurrence of the event giving rise to

such actual total loss or constructive, agreed or compromised total loss, the date specified in such notice from Charterer for the termination of this Charter may be any date not more than 45 days after the Acknowledgement Date. On the termination date specified in such written notice, Charterer will pay to Owner the Stipulated Loss Value for the Vessel determined as set forth in Section 21.2 hereof (plus, in the circumstances contemplated by clause *(b)* above, the premium, if any, payable on redemption of the Bonds resulting therefrom) less any credit referred to in clause *(ii)* of Section 21.3 hereof.

• • •

21.2 *Stipulated Loss Value.* For purposes of Sections 16, 17, 19, 20.9 and 27 hereof, the Stipulated Loss Value for the Vessel shall be equal to the sum of *(i)* the amount specified as of the Basic Hire Payment Date (or the Delivery Date if there is no preceding Basic Hire Payment Date) on or immediately preceding the date of requisition, seizure or forfeiture in the case of Section 19 or, in the case of Section 17, the date of the event giving rise to such loss specified therein (such date being hereinafter referred to as the "*Calculation Date*") (or as of the Basic Hire Payment Date on or immediately preceding the particular date of determination specified therein in the case of Sections 16, 20.9 and 27 hereof (or the Delivery Date if there is no preceding Basic Hire Payment Date)) in Schedule I annexed hereto (including the amount equal to premium referred to in such Schedule I), *plus (ii)* in the case of Sections 17 and 19 hereof, an amount equal to interest computed at a rate per annum (computed on the basis of a 360-day year of twelve 30-day months) on the amount referred to in clause (i) of this sentence from, but not includ-

ing, the Basic Hire Payment Date immediately preceding the Calculation Date to and including the termination date, which rate shall be 8% to the extent of the then outstanding principal amount of the Bonds, 7.95% to the extent of the then outstanding principal amount of the Guaranteed Bonds, 7.95% to the extent of the then outstanding principal amount of the Third Mortgage Note and 4% per annum above the Prime Rate as to the balance of such amount referred to in clause (i) of this sentence, *plus (iii)* in the case of Sections 17 and 19 hereof, if any redemption of all of the Outstanding Bonds or Guaranteed Bonds occurring in connection with the payment of Stipulated Loss Value shall, because of the requirements of the Senior Indenture, the First Preferred Ship Mortgage or the Guaranteed Bond Indenture in respect of when notices of redemption may be given, not be able to be made on the termination date of the Charter, an amount equal to interest, at the respective rates borne thereby, on the principal amounts of such Bonds, or Guaranteed Bonds, as the case may be, from, but not including, such termination date to and including the earliest practicable date for the redemption of such Bonds or Guaranteed Bonds, as the case may be, after such termination date, *less (iv)* the aggregate amount of any Basic Hire payments made as required in the next sentence of this Section 21.2. In addition, for the purposes of both of the foregoing sentences, in the case of Sections 17, 19 and 20.9 hereof, Charterer will pay the Basic Hire due on each Basic Hire Payment Date occurring from, but not including, the date of the occurrence of the event giving rise to the payment of the Stipulated Loss Value of the Vessel to and including the termination date.

• • •

Schedule II
to
Bareboat Charter

SCHEDULE FOR DETERMINATION OF TERMINATION VALUE

The amount of Termination Value referred to in Section 21.4 of the Bareboat Charter shall be, as of any Basic Hire Payment Date occurring after the Delivery Date, the amount below for such Payment Date plus an amount equal to the premium, if any, payable on the Bonds and on the Guaranteed Bonds on such Payment Date.

Basic Hire Payment Date (after Delivery Date)	Termination Value	Basic Hire Payment Date (after Delivery Date)	Termination Value
Delivery Date	$121,126,000	18	$123,312,000
1	120,756,000	19	122,508,000
2	121,872,000	20	123,288,000
3	122,904,000	21	124,068,000
4	123,852,000	22	124,848,000
5	124,788,000	23	125,616,000
6	122,532,000	24	123,192,000
7	121,848,000	25	122,328,000
8	122,748,000	26	123,060,000
9	123,636,000	27	123,780,000
10	124,524,000	28	124,500,000
11	125,412,000	29	125,220,000
12	123,096,000	30	122,724,000
13	122,352,000	31	121,812,000
14	123,192,000	32	122,484,000
15	124,032,000	33	123,156,000
16	124,860,000	34	123,816,000
17	125,688,000	35	124,476,000

Basic Hire Payment Date (after Delivery Date)	Termination Value	Basic Hire Payment Date (after Delivery Date)	Termination Value
36	$113,940,000	70	$95,904,000
37	112,968,000	71	96,108,000
38	113,592,000	72	93,120,000
39	114,204,000	73	91,740,000
40	114,804,000	74	91,944,000
41	115,404,000	75	92,148,000
42	112,812,000	76	92,364,000
43	111,792,000	77	92,568,000
44	112,344,000	78	89,580,000
45	112,908,000	79	88,476,000
46	113,460,000	80	88,980,000
47	114,000,000	81	89,472,000
48	111,348,000	82	89,976,000
49	110,268,000	83	90,480,000
50	110,796,000	84	79,776,000
51	111,312,000	85	78,660,000
52	111,828,000	86	79,152,000
53	112,344,000	87	79,644,000
54	109,668,000	88	80,124,000
55	108,576,000	89	80,616,000
56	109,080,000	90	77,904,000
57	109,596,000	91	76,776,000
58	110,100,000	92	77,256,000
59	110,616,000	93	77,736,000
60	99,924,000	94	78,216,000
61	98,820,000	95	78,696,000
62	99,036,000	96	75,972,000
63	99,240,000	97	74,832,000
64	99,456,000	98	75,288,000
65	99,660,000	99	75,744,000
66	96,672,000	100	76,200,000
67	95,280,000	101	76,656,000
68	95,484,000	102	73,920,000
69	95,700,000	103	72,768,000

Basic Hire Payment Date (after Delivery Date)	Termination Value	Basic Hire Payment Date (after Delivery Date)	Termination Value
104	$73,212,000	138	$60,048,000
105	73,656,000	139	58,824,000
106	74,100,000	140	59,196,000
107	74,556,000	141	59,556,000
108	71,796,000	142	59,916,000
109	70,632,000	143	60,288,000
110	71,076,000	144	57,456,000
111	71,508,000	145	56,208,000
112	71,940,000	146	56,556,000
113	72,372,000	147	56,916,000
114	69,600,000	148	57,264,000
115	68,436,000	149	57,612,000
116	68,856,000	150	54,768,000
117	69,276,000	151	53,508,000
118	69,696,000	152	53,844,000
119	70,116,000	153	54,180,000
120	67,332,000	154	54,504,000
121	66,156,000	155	54,840,000
122	66,564,000	156	51,984,000
123	66,972,000	157	50,700,000
124	67,380,000	158	51,024,000
125	67,776,000	159	51,336,000
126	64,992,000	160	51,660,000
127	63,792,000	161	51,972,000
128	64,188,000	162	49,092,000
129	64,584,000	163	47,808,000
130	64,980,000	164	48,108,000
131	65,364,000	165	48,408,000
132	62,568,000	166	48,708,000
133	61,356,000	167	49,008,000
134	61,728,000	168	46,116,000
135	62,112,000	169	44,808,000
136	62,496,000	170	45,084,000
137	62,868,000	171	45,372,000

Basic Hire Payment Date (after Delivery Date)	Termination Value	Basic Hire Payment Date (after Delivery Date)	Termination Value
172	$45,648,000	207	$24,696,000
173	45,936,000	208	24,864,000
174	43,020,000	209	25,020,000
175	41,688,000	210	21,984,000
176	41,952,000	211	20,532,000
177	42,216,000	212	20,664,000
178	42,480,000	213	20,796,000
179	42,744,000	214	20,940,000
180	39,816,000	215	21,072,000
181	38,472,000	216	17,220,000
182	38,712,000	217	17,340,000
183	38,964,000	218	17,448,000
184	39,204,000	219	17,568,000
185	39,456,000	220	17,676,000
186	36,504,000	221	17,784,000
187	35,136,000	222	13,104,000
188	35,364,000	223	13,200,000
189	35,580,000	224	13,284,000
190	35,808,000	225	13,380,000
191	36,036,000	226	13,464,000
192	33,060,000	227	13,548,000
193	31,680,000	228	8,844,000
194	31,884,000	229	8,916,000
195	32,088,000	230	8,988,000
196	32,292,000	231	9,048,000
197	32,496,000	232	9,120,000
198	29,496,000	233	9,192,000
199	28,092,000	234	4,476,000
200	28,272,000	235	4,524,000
201	28,452,000	236	4,584,000
202	28,644,000	237	4,632,000
203	28,824,000	238	4,692,000
204	25,812,000	239	4,740,000
205	24,372,000	240	—0—
206	24,540,000		

BAREBOAT CHARTER PARTY

Bareboat Charter Party, dated as of December 1, 1974, between Wilmington Trust Company, not in its individual capacity but solely as Owner Trustee ("Owner", which term shall be deemed to refer to any institution serving as a successor trustee pursuant to the terms of the Trust Agreement) under the Trust Agreement, dated as of December 1, 1974 (the "Trust Agreement"), between Owner and General Electric Credit Corporation, a New York corporation (the "Trustor"), and Kingsway Tankers, Inc., a New York corporation ("Charterer").

In consideration of the mutual agreements herein, the parties hereto agree as follows:

• • •

7. Maintenance; Classification. Charterer shall have full responsibility for maintenance and repair of the Vessel throughout the Charter Period, and at its expense (whether or not any applicable insurance proceeds are adequate for the purpose) will (unless otherwise required by any military authority of the United States and except during such period as *(1)* the use or title of the Vessel has been taken, requisitioned or chartered by any government or governmental body as contemplated in Section 2.07(g) of Exhibit 1 to the First Mortgage, *(2)* there has been an actual or constructive total loss, or an agreed or compromised total loss of the Vessel or *(3)* there has been any other loss with respect to the Vessel, and Charterer shall not have had a reasonable time to repair the same) *(a)* maintain and preserve the Vessel and her equipment in good running order and repair in accordance with good commercial maintenance practice, so that the Vessel shall be, in so far as due

diligence can make her so, tight, staunch, strong and well and sufficiently tackled, appareled, furnished, equipped and in every respect seaworthy and in as good operating condition as when delivered hereunder, ordinary wear and tear excepted, *(b)* on and after the Delivery Date, except with the express permission of Owner, the Secretary and the Indenture Trustee during any idle or inactive period, keep the Vessel in such condition as will entitle her to the highest classification and rating by the Classification Society for vessels of the same age, type and use and *(c)* cause the Vessel to be overhauled when necessary and to be drydocked, cleaned and bottom painted when necessary, but at least as often as may be required by applicable United States Coast Guard regulations and by the Classification Society. Charterer shall, promptly after acceptance of the Vessel under this Charter, furnish to Owner, the Mortgagee, the Secretary, the Indenture Trustee and American Petrofina, a Certificate of Classification (or recommendation for classification issued by the Classification Society Surveyor) issued by the Classification Society showing the above-mentioned classification and rating. During each calendar year after the year in which the Vessel is accepted under this Charter, Charterer shall (unless any military authority of the United States requires the above-mentioned classification and rating not to be retained and except during periods as aforesaid) *(1)* furnish to Owner, the Mortgagee, the Secretary, the Indenture Trustee and American Petrofina a Certificate of Confirmation of Class issued by the Classification Society showing that the above-mentioned classification and rating have been retained and *(2)* promptly furnish to the Owner, the Mortgagee, the Secretary, the Indenture Trustee and American Petrofina copies of all Classification

Society reports on annual, other periodic and damage surveys.

* * *

16. Insurance. (a) Charterer shall, at its own expense, keep the Vessel insured against the risks indicated below, in addition to such other risks as Owner, the Indenture Trustee, American Petrofina, and the Secretary or any one of them may reasonably specify from time to time, in an amount in dollars (in any coin or currency of the United States which at the time of payment under the policy in question is legal tender for public and private debts) equal to, except as otherwise approved in writing by Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary, the greater of 105% of the Stipulated Loss Value for the Vessel (determined as of the Basic Hire Payment Date on or immediately preceding the date of computation) or the then full commercial value of the Vessel:

(1) marine and war risk hull and machinery insurance under the latest (at the time of issue of the policies in question) forms of American Institute of Marine Underwriters' policies approved by Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary and/or policies issued by or for the Secretary of Commerce (as used in this Section 16 the term "Secretary of Commerce" shall have the meaning ascribed to that term in the First Mortgage) (or under other forms of policies as Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary may approve in writing) insuring the Vessel against the usual risks covered by such forms (including, at the option of the Charterer, such amounts of increased value and other forms of "total loss only" insurance as are permitted by such hull insurance policies);

(2) (a) marine and war risk protection and indemnity insurance, and (b) insurance against liability arising out of pollution, spillage or leakage, in such forms as Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary may approve in writing, which insurance in respect of oil pollution liability shall be maintained in a prudent manner and shall be generally comparable to marine insurance practices employed by experienced and responsible companies engaged in the marine transportation of petroleum and related products, and in no event shall such insurance with respect to oil pollution liability be in any amount less than $20,000,000 per incident without the consent of Owner, the Indenture Trustee and the Secretary. In furtherance of the foregoing and so long as, in the opinion of Charterer, it is prudent and reasonably possible to do so, the Charterer agrees to maintain membership in the International Tankerer Owner's Pollution Federation, Ltd. and enroll the Vessel in "Tanker Owner's Voluntary Agreement for Liability for Oil Pollution" (TOVALOP), or any successor thereto or similar association which may be formed in the future and to extend protection and indemnity insurance to include coverage for pollution liability under the Water Quality Improvement Act of 1970 as in force in the United States of America and the Civil Liability Convention adopted in Brussels on November 28, 1969 and any future law or convention which may from time to time apply to the Vessel;

(3) single interest mortgagee insurance and owner's equity insurance covering (A) Owner and the Trustor, unless otherwise consented to in writing by the Trustor and American Petrofina, and (B) the Indenture Trustee and the Loan Participant, unless otherwise consented to in writing by the Loan Participant, and (C) the Secretary in respect of his interests under the Security Agreement, unless otherwise consented to in writing by American Petrofina, against in each case any acts or omissions of Charterer

whereby any insurance required by this Section 16 shall or may be suspended, impaired or defeated;

(4) insurance against requisition of title of the Vessel by the United States, in such form and in such lesser amount as Owner, the Indenture Trustee and American Petrofina may approve in writing, *provided* that in any event such amount need not exceed the stipulated loss value at any time as shown in Exhibit I attached to the American Petrofina Guaranty Agreement; and

(5) while the Vessel is idle or laid up, at the option of Charterer and in lieu of the above-mentioned marine and war risk hull or marine and war risk hull and increased value insurance, port risk insurance under the latest (at the time of issue of the policies in question) forms of American Institute of Marine Underwriters' policies approved by Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary and/or policies issued by or for the Secretary of Commerce or under such other forms of policies as Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary may approve in writing insuring the Vessel against the usual risks covered by such forms;

provided that war risk insurance shall not be required if and to the extent approved by Owner, the Indenture Trustee, the Secretary and American Petrofina (and certified to Charterer, Owner, the Mortgagee and the Indenture Trustee).

Irrespective of the foregoing, Charterer, with the prior written consent of the Secretary, Owner, the Indenture Trustee and American Petrofina (a copy of which shall be filed by Charterer with Owner, the Mortgagee, the Indenture Trustee and American Petrolina) shall have the right to self-insure up to the first $500,000 of any loss re-

sulting from any one accident or occurrence (other than an actual or constructive total loss of the Vessel) covered under the marine and war risk hull and machinery polices.

(b) All policies of insurance under this Section shall, except as provided in subsection (f), provide that (*i*) until the insurers shall have received notice satisfactory to them from the Mortgagee, the Secretary, the Indenture Trustee or Owner that no Bonds are Outstanding all losses in excess of $100,000 shall be payable solely to the Mortgagee, *provided* that, in the event the First Mortgage shall have been assigned to the Secretary and the insurers shall have been notified, all losses in excess of $50,000 shall be payable solely to the Secretary, (*ii*) after the Bonds are no longer Outstanding but until the insurers shall have received notice satisfactory to them from the Secretary or Owner that no Guaranteed Bonds are Outstanding, all losses in excess of $100,000 shall be payable solely to the Secretary, (*iii*) after the Guaranteed Bonds are no longer Outstanding but until the insurers shall have received notice satisfactory to them from the Indenture Trustee or Owner that no Loan Certificates are Outstanding, all losses in excess of $100,000 shall be payable solely to the Indenture Trustee, and (*iv*) after the Loan Certificates are no longer Outstanding and the insurers shall have been notified, all losses in excess of $100,000 shall be payable solely to Owner who shall make distribution as interance brokers qualifying under subsection (g) of this Section) as to the insurance maintained by Charterer pursuant to this Section, specifying the respective policies of insurance covering the same and stating, in effect, that such insurance complies in all respects with the applicable requirements of this Section.

(o) Nothing in this Section shall limit any additional insurance coverage which the United States may require

pursuant to any other contract or agreement to which the United States and the Charterer are parties.

(p) The Charterer agrees to send copies of all receipts for payment of insurance premiums, club calls and assessments, if any, with respect to the insurance required by this Section on the Delivery Date and in each calendar year thereafter, and at such other times as the Owner may request.

17. Loss. In the event that (*a*) the Vessel shall become an actual total loss or there is a constructive or an agreed or compromised total loss of the Vessel or (*b*) the Vessel shall sustain damage to an extent which, in Charterer's and American Petrofina's opinion, as determine in good faith by duly authorized officers of Charterer and American Petrofina, respectively, makes repair of the Vessel not economically possible or renders the Vessel permanently unfit for normal use, then Charterer shall give notice thereof as required in Section 15 hereof and, in addition, shall give written notice to Owner (with copies to the Mortgagee, the Indenture Trustee, the holders of the Loan Certificates and the Secretary) of the termination of this Charter on any date occurring not more than 90 or, with American Petrofina's approval, 150 days after the occurrence of the event giving rise to such constructive, agreed or compromised total loss or of such actual total loss or of such determination. On the termination date specified in such written notice, Charterer will pay to Owner the Stipulated Loss Value for the Vessel determined as set forth in Section 21.2 hereof (plus, in the circumstances contemplated by clause (*b*) above, the premium, if any, payable on

redemption of the bonds resulting therefrom) less any credit referred to in clause (*ii*) of Section 21.3 hereof.

• • •

21.02. *Stipulated Loss Value.* For purposes of Sections 16, 17, 19 and 27 hereof, the Stipulated Loss Value for the Vessel shall be equal to the sum of (*i*) the amount specified as of the Basic Hire Payment Date on or immediately preceding the termination date (or as of the Basic Hire Payment Date on or immediately preceding the particular date of determination in the case of Sections 16 and 27 hereof) in Schedule I annexed hereto, and (*ii*) in the case of Sections 17 and 19 hereof, if the termination date is not a Basic Hire Payment Date, an amount equal to interest computed at a rate per annum (computed on the basis of a 360-day year of twelve 30-day months) on the amount referred to in clause (*i*) of this sentence from, but not including, the Basic Hire Payment Date immediately preceding the termination date to and including the termination date, which rate shall be the rate or respective rates of interest borne by the then Outstanding Bonds to the extent of the principal amount thereof, 9.30% to the extent of the then outstanding principal amount of the Guaranteed Bonds, 13% to the extent of the then outstanding principal amount of the Loan Certificates and 13% as to the balance of such amount referred to in clause (*i*) of this sentence. In addition, for the purposes of both of the foregoing sentences, in the case of Sections 17 and 19 hereof, Charterer will pay the Basic Hire due on each Basic Hire Payment Date occurring prior to or on, but not after, the termination date, including the Basic Hire due on any such Basic Hire Payment Date occurring between the occurrence of

the event giving rise to the payment of the Stipulated Loss Value of the Vessel and the termination date.

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Schedule I
to
Bareboat Charter

SCHEDULE FOR DETERMINATION OF STIPULATED LOSS VALUE

The amount of Stipulated Loss Value referred to in clause *(i)* of Section 21.2 of the Bareboat Charter shall be, as of any Basic Hire Payment Date occurring after the Delivery Date, the amount below for such Payment Date.

Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value	Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value
74		17	$83,399,000
1	$79,301,000	18	80,390,000
2	80,048,000	19	81,054,000
3	80,795,000	20	81,717,000
4	81,539,000	21	82,379,000
5	82,283,000	22	83,039,000
6	79,336,000	23	83,699,000
7	80,062,000	24	81,357,000
8	80,787,000	76	
9	81,511,000	25	81,988,000
10	82,233,000	26	82,618,000
11	82,953,000	27	83,246,000
12	79,983,000	28	83,874,000
75		29	84,501,000
13	80,689,000	30	82,126,000
14	81,353,000	31	81,742,000
15	82,036,000	32	83,356,000
16	82,718,000	33	83,969,000

Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value
34	$84,581,000
35	85,192,000
36	79,150,000
77	
37	79,741,000
38	80,330,000
39	80,919,000
40	81,506,000
41	82,093,000
42	79,679,000
43	80,246,000
44	80,812,000
45	81,377,000
46	81,941,000
47	82,503,000
48	80,065,000
78	
49	80,608,000
50	81,149,000
51	81,690,000
52	82,230,000
53	82,769,000
54	80,308,000
55	80,827,000
56	81,346,000
57	81,864,000
58	82,380,000
59	82,896,000
60	76,760,000
79	
61	77,255,000
62	77,750,000
63	78,244,000
64	78,738,000
65	79,230,000
66	$76,722,000
67	77,196,000
68	77,668,000
69	78,140,000
70	78,611,000
71	79,081,000
72	76,550,000
80	
73	77,000,000
74	77,449,000
75	77,898,000
76	78,346,000
77	78,793,000
78	76,240,000
79	76,668,000
80	77,096,000
81	77,523,000
82	77,949,000
83	78,374,000
84	72,147,000
85	72,553,000
86	72,958,000
87	73,362,000
88	73,766,000
89	74,170,000
90	71,573,000
91	71,963,000
92	72,354,000
93	72,744,000
94	73,135,000
95	73,525,000
96	70,914,000
97	71,295,000
98	71,675,000
99	72,055,000

Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value
100	$72,435,000
101	72,814,000
102	70,194,000
103	70,565,000
104	70,935,000
105	71,305,000
106	71,675,000
107	72,045,000
108	69,415,000
109	69,776,000
110	70,136,000
111	70,497,000
112	70,857,000
113	71,218,000
114	68,579,000
115	68,930,000
116	69,281,000
117	69,633,000
118	69,984,000
119	70,336,000
120	67,687,000
121	68,029,000
122	68,372,000
123	68,714,000
124	69,056,000
125	69,399,000
126	66,742,000
127	67,075,000
128	67,408,000
129	67,741,000
130	68,074,000
131	68,407,000
132	65,741,000
133	66,064,000
134	66,388,000
135	$66,711,000
136	67,035,000
137	67,360,000
138	64,684,000
139	64,999,000
140	65,313,000
141	65,628,000
142	65,944,000
143	66,259,000
144	63,575,000
145	63,880,000
146	64,186,000
147	64,492,000
148	64,799,000
149	65,106,000
150	62,414,000
151	62,711,000
152	63,009,000
153	63,307,000
154	63,605,000
155	63,904,000
156	61,203,000
157	61,429,000
158	61,782,000
159	62,072,000
160	62,362,000
161	62,653,000
162	59,945,000
163	60,226,000
164	60,508,000
165	60,791,000
166	61,074,000
167	61,357,000
168	58,641,000
169	58,915,000

Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value	Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value
170	$59,189,000	204	$49,910,000
171	59,464,000	205	50,139,000
172	59,740,000	206	50,369,000
173	60,016,000	207	50,600,000
174	57,293,000	208	50,831,000
175	57,560,000	209	51,063,000
176	57,828,000	210	48,295,000
177	58,096,000	211	48,516,000
178	58,365,000	212	48,738,000
179	58,634,000	213	48,961,000
180	55,904,000	214	49,183,000
181	56,164,000	215	49,407,000
182	56,424,000	216	46,631,000
183	56,685,000	217	46,844,000
184	56,947,000	218	47,057,000
185	57,209,000	219	47,271,000
186	54,472,000	220	47,485,000
187	54,725,000	221	47,700,000
188	54,978,000	222	44,915,000
189	55,232,000	223	45,120,000
190	55,486,000	224	45,324,000
191	55,741,000	225	45,529,000
192	52,997,000	226	45,735,000
193	53,242,000	227	45,941,000
194	53,488,000	228	43,147,000
195	53,734,000	229	43,343,000
196	53,981,000	230	43,538,000
197	54,229,000	231	43,734,000
198	51,477,000	232	43,931,000
199	51,714,000	233	44,127,000
200	51,952,000	234	41,325,000
201	52,191,000	235	41,511,000
202	52,430,000	236	41,699,000
203	52,670,000	237	41,887,000

Basic Hire Payment Date (after Delivery Date	Stipulated Loss Value	Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value
238	$42,077,000	271	$29,292,000
239	42,267,000	272	29,415,000
240	39,460,000	273	29,539,000
241	39,636,000	274	29,664,000
242	39,813,000	275	29,788,000
243	39,990,000	276	26,913,000
244	40,168,000	277	27,025,000
245	40,348,000	278	27,137,000
246	37,528,000	279	27,249,000
247	37,695,000	280	27,362,000
248	37,862,000	281	27,474,000
249	38,029,000	282	24,587,000
250	38,196,000	283	24,687,000
251	38,364,000	284	24,787,000
252	35,533,000	285	24,887,000
253	35,689,000	286	24,987,000
254	35,846,000	287	25,087,000
255	36,003,000	288	22,188,000
256	36,160,000	289	22,275,000
257	36,318,000	290	22,363,000
258	33,476,000	291	22,450,000
259	33,622,000	292	22,538,000
260	33,768,000	293	22,625,000
261	33,914,000	294	19,713,000
262	34,061,000	295	19,788,000
263	34,208,000	296	19,862,000
264	31,355,000	297	19,936,000
265	31,490,000	298	20,011,000
266	31,625,000	299	20,085,000
267	31,760,000	300	17,160,000
268	31,896,000		
269	32,032,000		
270	29,168,000		

BAREBOAT CHARTER PARTY

Bareboat Charter Party, dated as of March 15, 1979, between United States Trust Company of New York, not in its individual capacity but solely as Owner Trustee (*"Owner"*, which term shall be deemed to refer to any in*stitution* serving as a successor trustee pursuant to the terms of the Trust Agreement) under the Trust Agreement, dated as of March 15, 1979 (the *"Trust Agreement"*), among United States Trust Company of New York, a New York corporation, Security Pacific Equipment Leasing, Inc., a Delaware corporation (*"Security Pacific"*), and American Road Equity Corporation, a Delaware corporation (*"AMREC"*). and Richmond Tankers, Inc., a Delaware corporation (*"Charterer"*).

In consideration of the mutual agreements herein, the parties hereto agree as follows:

* * *

7. Maintenance; Classification. Charterer shall have full responsibility for maintenance and repair of the Vessel throughout the Charter Period, and at its expense (whether or not any applicable insurance proceeds are adequate for the purpose) will (unless otherwise required by any military authority of the United States and except during such period as (*1*) the use or title of the Vessel has been taken or requisitioned by any government or governmental body as provided for in Section 2.04(b) of Exhibit 1 to the Security Agreement, (*2*) there has been an actual or constructive total loss, or an agreed or compromised total loss of the Vessel or (*3*) there has been any other loss with respect to the Vessel, and Charterer shall

not have had a reasonable time to repair the same) (*a*) maintain and preserve the Vessel and her equipment in good running order and repair in accordance with good commercial maintenance practice, so that the Vessel shall be, in so far as due diligence can make her so, tight, staunch, strong and well and sufficiently tackled, apparel, furnished, equipped and in every respect seaworthy and in as good operating condition as when delivered hereunder, ordinary wear and tear excepted, (*b*) except with the express permission of Owner, the Secretary and the Loan Participant during any idle or inactive period, keep the Vessel in such condition as will entitle her to the highest classification and rating by the Classification Society for vessels of the same age, type and use and (*c*) cause the Vessel to be overhauled when necessary and to be drydocked, cleaned and bottom painted when necessary, but at least as often as may be required by applicable United States Coast Guard regulations and by the Classification Society. Charterer shall, promptly after acceptance of the Vessel under this Charter, furnish to Owner, each Trustor, the Secretary and the Loan Participant, a Certificate of Classification issued by the Classification Society (or recommendation for classification issued by the Classification Society surveyor) showing the above-mentioned classification and rating. During each calendar year after the year in which the Vessel is accepted under this Charter, Charterer shall (unless any military authority of the United States requires the above-mentioned classification and rating not to be retained and except during periods as aforesaid) (*1*) furnish to Owner, each Trustor, the Secretary and the Loan Participant a Certificate of Confirmation of Class issued by the Classification Society showing

that the above-mentioned classification and rating have been retained and (*2*) promptly furnished to Owner, each Trustor, the Secretary and the Loan Participant copies of all Classification Society reports on annual, other periodic and damage surveys.

* * *

16. Insurance. (a) Charterer shall, at its own expense, keep the Vessel insured against the risks indicated and as otherwise provided below, in addition to such other risks as Owner, the Trustors, the Secretary and the Loan Participant or any one of them may reasonably specify from time to time:

(1) Marine and war risk hull and machinery insurance under the latest (at the time of issue or renewal of the insurance in question) form of policy adopted by the American Institute of Marine Underwriters and approved by Owner, the Trustors, the Secretary and the Loan Participant and/or policies issued by or for the Secretary of Commerce (or under such other forms of policies as Owner, the Trustors, the Secretary and the Loan Participant may approve in writing) insuring the Vessel against the usual risks covered by such forms, in an amount in dollars (in any coin or currency of the United States which at the time of payment under the policy in question is legal tender for the payment of public and private debts) (the "*Required Amount*") equal to, except as otherwise approved in writing by Owner, the Trustors, the Secretary and the Loan Participant, the greatest of (*x*) 105% of the Stipulated Loss Value for the Vessel (determined as of the Basic Hire Payment Date on or immediately preceding the date of computation or, if there is no such immediately preceding Basic Hire Payment Date, the Delivery Date, but without including any amount equal to premiums referred to in Section 21.2 hereof), (*y*) 110% of the aggregate unpaid principal amount of the Outstanding Bonds and the Second Mortgage Note or (*z*) 100% of the then full commercial value of the Vessel as determined by the Secretary or, after the Mortgage has been discharged, the Loan Participant or, after the Second Mortgage has been discharged, the Owner (provided that the Required Amount may include amounts of increased value and other forms of "total loss only" insurance not in excess of the amounts thereof permitted by such insurance policies and in any event not in excess of 20% of the full amount of insurance required to be maintained pursuant to this paragraph (1));

(2) (i) Marine risk protection and indemnity insurance, (ii) insurance against liability arising out of pollution, spillage or leakage, and (iii) war risk protection and indemnity insurance (including excess coverage to the extent available), all in such forms as Owners, the Trustors, the Secretary and the Loan Participant shall approve in writing and in such amounts as are required by the provisions of paragraph (1) of this Section 16(a) or such greater amounts as any of Owner, the Trustors, the Secretary or the Loan Participant shall require (but, in the case of any such greater amounts, not in excess of the amounts generally maintained by experienced and responsible companies engaged in the marine transportation of petroleum and related products). The insurance required by this paragraph (2) shall be maintained in a prudent manner and shall be generally comparable to marine insurance practices employed by experienced and responsible companies engaged in the marine transportation of petroleum and related products and shall protect Owner and each Trustor without limit over and above the collision liability coverage afforded by the hull insurance "running down" clause. In no event shall such insurance be in an amount less than $150,000,000 per incident ($100 000,000 per incident in the case of insurance with respect to pollution, spillage or leakage) without the consent of Owner, the Trustors, the Secretary, and the Loan Participant. So long as

it is possible to do so the Charterer shall (unless Owner, the Trustors, the Secretary and the Loan Participant consent to its not doing so, which consent shall not be unreasonably withheld) maintain membership in the International Tanker Owner's Pollution Federation Ltd. and enroll the Vessel in "Tanker Owner's Voluntary Agreement for Liability for Oil Pollution" (TOVALOP), or any successor thereto or similar association which may be formed in the future and to extend protection and indemnity insurance to include coverage for pollution liability under the Water Quality Improvement Act of 1970 as in force in the United States of America and the Civil Liability Convention adopted in Brussels on November 28, 1969 and any future law or convention which may from time to time apply to the Vessel;

(3) Single interest owner's equity insurance covering the Trustors, unless otherwise consented to in writing by the Trustors, against in each case any acts or omissions of Charterer or any other named insured under any insurance required by this Section 16 (other than a Trustor) or the operator of the Vessel under the Management Agreement or any other operating agreement whereby any insurance required by this Section 16 shall or may be suspended, impaired or defeated, (*i*) in the case of the insurance referred to in paragraph (1) or (4) of this Section 16(a), in an amount equal to 105% of the Stipulated Loss Value less 105% of the aggregate unpaid principal amount of the Outstanding Bonds and the Second Mortgage Note and (*ii*) in the case of the insurance referred to in paragraph (2) of this Section 16(a), in the amounts required to be maintained pursuant to such paragraph (2); and

(4) While the Vessel is idle or laid up, at the option of Charterer and in lieu of the insurance referred to in paragraph (1) of this Section 16(a), port risk insurance (including coverage for war risk) under the latest (at the time of issue of the policies in question) forms of American Institute of Marine Underwriters' policies approved by Owner, the Trustors, the Secretary and the Loan Participant and/or policies

issued by or for the Secretary of Commerce or under such other forms of policies as Owner, the Trustors, the Secretary and the Loan Participant may approve in writing insuring the Vessel against the usual risks covered by such forms, in the amount required by paragraph (1) of this Section 16(a).

Irrespective of the foregoing, Charterer, with the prior written consent of the Secretary, Owner, and the Trustors (a copy of which shall be filed by Charterer with Owner, each Trustor, the Loan Participant and the Secretary) shall have the right to self-insure up to the first $500,000 of any loss resulting from any one accident or occurrence (other than an actual or constructive total loss of the Vessel) covered under the policies referred to in paragraphs (1) and (4) of this Secretary 16(a). Charterer shall also have the right, without any prior consent, to self-insure up to the first $250,000 of any loss resulting from any one accident or occurrence covered under any policy required by this Section 16(a) plus $250,000 with respect to property and cargo carried.

(b) All policies of insurance required to be maintained under this Section 16 shall, except as provided in Section 16(f) hereof, provide that (*i*) until the insurers shall have received notice satisfactory to them from the Secretary that the Secretary's Note has been paid in full, all insured losses in excess of $100,000 shall be payable solely to the Secre- . . .

* * *

Loan Participant), Owner or Trustors may elect, by written notice to Charterer (each such election to be effective until the earlier of the date on which it is withdrawn by notice from Owner or Trustors to Charterer or one year from the date such notice is effective) given prior to the occurrence of any accident, occurrence or event which re-

quires that Charterer give a notice of termination of this Charter pursuant to Section 17 or Section 19 hereof, to reimburse Charterer for the cost attributable to the maintenance of such insurance in the amount required by clause (z) of paragraph (1) of Section 16(a) hereof to the extent that such cost exceeds the cost which Charterer would incur if such insurance were maintained in an amount equal to the sum of (*i*) the higher of the amounts referred to in clauses (x) and (y) of said paragraph (1) plus (*ii*) the portion of the Excess properly attributable to Charterer's demise interest under this Charter. If Owner or Trustors shall make such election, Owner and Trustors (by their execution and delivery of the Participation Agreement) jointly and severally agree so to reimburse Charterer and in the event of an accident, occurrence or event referred to in paragraph (2) of Section 16(b) hereof which occurs during the period such election is effective, the portion of any insurance recoveries referred to in clause "third" of each of subparagraph (A) and (B) of said paragraph (2) in respect of the Excess shall be distributed to Charterer only to the extent properly attributable to its demise interest under this Charter and any balance remaining thereafter shall be retained by or paid to Owner.

(p) The Charterer agrees to send to Owner, each Trustor, the Secretary and the Loan Participant copies of all receipts for payment of insurance premiums, club calls and assessments, if any, with respect to the insurance required by this Section 16 on the Delivery Date and in each calendar year thereafter, and at such other times as the Owner may request.

17. Loss. In the event that (*a*) the Vessel shall become an actual total loss or there is a constructive or an agreed or compromised total loss of the Vessel or (*b*) the

Vessel shall sustain damage to an extent which, in Charterer's opinion, as determined in good faith by a duly authorized officer of Charterer, makes repair of the Vessel not economically possible or renders the Vessel permanently unfit for normal use, then Charterer shall give notice thereof as required in Section 15 hereof, and, in addition, shall give written notice to Owner (with copies to each Trustor, the Loan Participant and the Secretary) of the termination of this Charter on any date occurring not less than 45 days nor more than 150 days after the occurrence of the event giving rise to such constructive, agreed or compromised total loss or of such actual total loss or of such determination, *provided, however,* if the date (the "*Acknowledgement Date*") on which the insurance underwriters acknowledge that the Vessel has become an actual total loss or that there is a constructive, agreed or compromised total loss of the Vessel shall be more than 105 days after the occurrence of the event giving rise to such actual total loss or constructive, agreed or compromised total loss, the date specified in such notice from Charterer for the termination of this Charter may be any date not more than 45 days after the Acknowledgement Date. On the termination date specified in such written notice, Charterer will pay to Owner the Stipulated Loss Value for the Vessel determined as set forth in Section 21.2 hereof (including the premiums, if any, payable on redemption of the Bonds or prepayment of the Second Mortgage Note resulting therefrom) less any insurance recoveries or other amounts applied (or received by the Secretary, the Loan Participant, the Owner or any Trustor and required to be applied) in reduction of Charterer's obligation to pay such Stipulated Loss Value pursuant to Section 16(b) or Section 21.3 hereof.

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21.2. *Stipulated Loss Value.* For purposes of Sections 16, 17, 19 and 27 hereof, the Stipulated Loss Value for the Vessel shall be equal to the sum of (*i*) the amount specified as of the Basic Hire Payment Date (or the Delivery Date if there is no preceding Basic Hire Payment Date) on or immediately preceding the date of requisition, seizure or forfeiture in the case of Section 19 or, in the case of Section 17, the date of the event giving rise to such loss specified therein (the date of such requisition, seizure, forfeiture or other event being hereinafter referred to as the "*Calculation Date*") (or as of the Basic Hire Payment Date on or immediately preceding the particular date of determination specified therein in the case of Sections 16 and 27 hereof (or the Delivery Date if there is no preceding Basic Hire Payment Date)) in Schedule I annexed hereto, *plus* (*ii*) in the case of Sections 17 and 19 hereof, an amount equal to interest computed at a rate per annum (computed on the basis of a 360-day year of twelve 30-day months) on the amount referred to in clause (i) of this sentence from, but not including, the Basic Hire Payment Date immediately preceding the Calculation Date to and including the termination date specified pursuant to said Section 17 or 19, which rate shall be 9.25% to the extent of the then outstanding principal amount of the Bonds, 9.9375% to the extent of the then outstanding principal amount of the Second Mortgage Note and the Stipulated Rate as to the balance of such amount referred to in clause (i) of this sentence, *plus* (*iii*) in the case of Sections 17 and 19 hereof, an amount equal to the premiums,

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Schedule I
to
Bareboat Charter Party

SCHEDULE FOR DETERMINATION OF STIPULATED LOSS VALUE

The amount for determination of Stipulated Loss Value referred to in clause *(i)* of Section 21.2 of the Charter shall be, as of any Basic Hire Payment Date, the amount determined by multiplying Vessel Cost by the percentage set forth below opposite the number of such Basic Hire Payment Date.

Number of Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value Percentage	Number of Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value Percentage
Delivery Date	105.7863%	20	117.2476%
1	105.7863	21	117.8378
2	103.6422	22	118.3937
3	104.4806	23	115.1524
4	105.1213	24	115.7232
5	104.5666	25	116.2622
6	105.1163	26	114.0247
7	105.6512	27	114.5528
8	112.9981	28	115.0483
9	113.6563	29	113.8280
10	114.2793	30	114.3482
11	110.7447	31	114.8358
12	111.3817	32	120.2739
13	111.9861	33	120.7927
14	109.6121	34	121.2781
15	110.2055	35	118.2949
16	110.7654	36	118.7951
17	109.5724	37	112.3651
18	110.1579	38	110.3215
19	110.7098	39	110.7390

Number of Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value Percentage	Number of Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value Percentage
40	111.1233%	74	104.4999%
41	109.9482	75	104.5873
42	110.3558	76	104.6396
43	110.7300	77	103.4131
44	115.2244	78	103.4822
45	115.6228	79	103.5160
46	115.9873	80	105.4723
47	113.3140	81	105.5096
48	113.6932	82	105.5313
49	114.0398	83	103.5104
50	112.0960	84	103.5286
51	112.4300	85	96.6419
52	112.7305	86	95.1104
53	111.5175	87	95.0728
54	111.8392	88	95.0327
55	112.1273	89	93.9265
56	115.6744	90	93.8833
57	115.9793	91	93.8376
58	116.2499	92	95.2556
59	113.7812	93	95.2168
60	114.0656	94	95.1756
61	107.4188	95	93.4625
62	105.6369	96	93.4145
63	105.8352	97	93.3641
64	105.9993	98	91.9739
65	104.8217	99	91.9142
66	105.0051	100	91.8519
67	105.1539	101	90.7951
68	107.9066	102	90.7297
69	108.0657	103	90.6617
70	108.1894	104	91.5389
71	105.9758	105	91.4744
72	106.1126	106	91.4074
73	106.2155	107	89.8976

Number of Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value Percentage	Number of Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value Percentage
108	89.8247%	142	78.3682%
109	89.7493	143	77.3098
110	88.4853	144	77.1468
111	88.4010	145	76.9811
112	88.3140	146	76.1632
113	87.3158	147	75.8280
114	87.2126	148	75.6512
115	87.1198	149	75.0136
116	87.5322	150	74.6336
117	87.4399	151	74.3866
118	87.3450	152	73.8572
119	86.0124	153	73.6667
120	85.9123	154	73.4753
121	85.8096	155	72.6563
122	84.6565	156	72.3183
123	84.5452	157	72.1184
124	84.4312	158	71.4463
125	83.5895	159	71.0324
126	83.3441	160	70.7847
127	83.2240	161	70.2165
128	83.2473	162	69.7966
129	83.1252	163	69.4762
130	83.0005	164	68.9523
131	81.8188	165	68.5641
132	81.6876	166	68.3336
133	81.5538	167	67.6754
134	80.5466	168	67.2530
135	80.3524	169	66.9682
136	80.2074	170	66.3896
137	79.4882	171	65.9541
138	79.1263	172	65.6038
139	78.9737	173	65.0723
140	78.6821	174	64.6398
141	78.5265	175	64.2448

Number of Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value Percentage	Number of Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value Percentage
176	63.7463%	210	47.3009%
177	63.2912	211	46.7855
178	62.9402	212	46.2699
179	62.3800	213	45.7359
180	61.9352	214	45.2612
181	61.5428	215	44.6621
182	61.0136	216	44.1363
183	60.5593	217	43.6095
184	60.1337	218	43.0659
185	59.6224	219	42.5299
186	59.1606	220	41.9826
187	58.7162	221	41.4390
188	58.2200	222	40.8922
189	57.7468	223	40.3468
190	57.3190	224	39.7999
191	56.7868	225	39.2496
192	56.3123	226	38.6865
193	55.8574	227	38.1123
194	55.3421	228	37.5966
195	54.8691	229	37.0498
196	54.3852	230	36.5036
197	53.8800	231	35.9885
198	53.3963	232	35.4362
199	52.8899	233	34.8992
200	52.4002	234	34.3851
201	51.9063	235	33.8523
202	51.4011	236	33.3212
203	50.8933	237	32.8165
204	50.3812	238	32.2777
205	49.8725	239	31.7303
206	49.3767	240	31.2469
207	48.8625	241	30.7446
208	48.3421	242	30.2596
209	47.8236	243	29.7789

Number of Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value Percentage	Number of Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value Percentage
244	29.2754%	255	24.1166%
245	28.7771	256	23.6446
246	28.3255	257	23.1950
247	27.8463	258	22.8163
248	27.3745	259	22.4111
249	26.8853	260	22.0263
250	26.3799	261	21.6233
251	25.8544	262	21.1985
252	25.4263	263	20.7741
253	24.9866	264 and thereafter	20.0000
254	24.5593		

BAREBOAT CHARTER PARTY

BAREBOAT CHARTER PARTY, dated as of December 1, 1973, between Wilmington Trust Company, as Owner Trustee ("Owner", which term shall be deemed to refer to any institution serving as a successor trustee pursuant to the terms of the Trust Agreement) under the Trust Agreement, dated as of December 1, 1973 (the "Trust Agreement"), between Owner and General Electric Credit Corporation, a New York corporation (the "Trustor"), and East River Steamship Corporation, a New York corporation ("Charterer").

In consideration of the mutual agreements herein, the parties hereto agree as follows:

* * *

7. Maintenance; Classification. Charterer shall have full responsibility for maintenance and repair of the

Vessel throughout the Charter Period, and at its expense (whether or not any applicable insurance proceeds are adequate for the purpose) will (unless otherwise required by any military authority of the United States and except during such period as *(1)* the use or title of the Vessel has been taken, requisitioned or chartered by any government or governmental body as contemplated in Section 2.07 *(g)* of Exhibit 1 to the First Mortgage, *(2)* there has been an actual or constructive total loss, or an agreed or compromised total loss of the Vessel or *(3)* there has been any other loss with respect to the Vessel, and Charterer shall not have had a reasonable time to repair the same) *(a)* maintain and preserve the Vessel and her equipment in good running order and repair in accordance with good commercial maintenance practice, so that the Vessel shall be, in so far as due diligence can make her so, tight, staunch, strong and well and sufficiently tackled, appareled, furnished, equipped and in every respect seaworthy and in as good operating condition as when delivered hereunder, ordinary wear and tear excepted, *(b)* on and after the Delivery Date, except with the express permission of Owner, the Secretary and the Indenture Trustee during any idle or inactive period, keep the Vessel in such condition as will entitle her to the highest classification and rating by the Classification Society for vessels of the same age, type and use and *(c)* cause the Vessel to be overhauled when necessary and to be drydocked, cleaned and bottom painted when necessary, but at least as often as may be required by applicable United States Coast Guard regulations and by the Classification Society. Charterer shall, promptly after acceptance of the Vessel under this Charter, furnish to Owner, the Mortgagee, the Secretary,

the Indenture Trustee and American Petrofina, a Certificate of Classification (or recommendation for classification issued by the Classification Society Surveyor) issued by the Classification Society showing the above-mentioned classification and rating. During each calendar year after the year in which the Vessel is accepted under this Charter, Charterer shall (unless any military authority of the United States requires the above-mentioned classification and rating not to be retained and except during periods as aforesaid) *(1)* furnish to Owner, the Mortgagee, the Secretary, the Indenture Trustee and American Petrofina a Certificate of Confirmation of Class issued by the Classification Society showing that the above-mentioned classification and rating have been retained and *(2)* promptly furnish to the Owner, the Mortgagee, the Secretary, the Indenture Trustee and American Petrofina copies of all Classification Society reports on annual, other periodic and damage surveys.

* * *

16. Insurance. (a) Charterer shall, at its own expense, keep the Vessel insured against the risks indicated below, in addition to such other risks as Owner, the Indenture Trustee, American Petrofina, and the Secretary may specify from time to time, in an amount in dollars (in any coin or currency of the United States which at the time of payment under the policy in question is legal tender for public and private debts) equal to, except as otherwise approved in writing by Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary, the greater of 105% of the Stipulated Loss Value for the Vessel (determined as of the Basic Hire Payment Date on or

immediately preceding the date of computation) or the then full commercial value of the Vessel:

(1) marine and war risk hull and machinery insurance under the latest (at the time of issue of the policies in question) forms of American Institute of Marine Underwriters' policies approved by Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary and/or policies issued by or for the Secretary of Commerce (as used in this Section 16 the term "Secretary of Commerce" shall have the meaning ascribed to that term in the First Mortgage) (or under such other forms of policies as Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary may approve in writing) insuring the Vessel against the usual risks covered by such forms (including, at the option of the Charterer, such amounts of increased value and other forms of "total loss only" insurance as are permitted by such hull insurance policies);

(2) marine and war risk protection and indemnity insurance, and insurance against liability arising out of pollution, spillage or leakage, in such forms as Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary may approve in writing, *provided* that insurance in respect of oil pollution liability need not be in an amount in excess of such insurance which is obtainable at the time on the world insurance market but in any event not less than $15,000,000 without the consent of Owner, the Indenture Trustee and the Secretary.

(3) single interest mortgagee insurance and owner's equity insurance covering *(A)* Owner and the Trustor, unless otherwise consented to in writing by the Trustor, and *(B)* the Indenture Trustee and the Loan Participant, unless otherwise consented to in writing by the Loan Participant, against in each case any acts or omissions of Charterer whereby any insurance required by this Section 16 shall or may be suspended, impaired or defeated;

(4) insurance against requisition of title of the Vessel by the United States, in such form and in such lesser amount as Owner, the Indenture Trustee and American Petrofina may approve in writing, *provided* that in any event such amount need not exceed the stipulated loss value at any time as shown in Exhibit I attached to the American Petrofina Guaranty Agreement; and

(5) while the Vessel is idle or laid up, at the option of Charterer and in lieu of the above-mentioned marine and war risk hull or marine and war risk hull and increased value insurance, port risk insurance under the latest (at the time of issue of the policies in question) forms of American Institute of Marine Underwriters' policies approved by Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary and/or policies issued by or for the Secretary of Commerce or under such other forms of policies as Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary may approve in writing insuring the Vessel against the usual risks covered by such forms;

provided that war risk insurance shall not be required if and to the extent approved by Owner, the Indenture Trustee, the Secretary and American Petrofina (and certified to Charterer, Owner, the Mortgagee and the Indenture Trustee).

Irrespective of the foregoing, Charterer, with the prior written consent of the Secretary, Owner, the Indenture Trustee and American Petrofina (a copy of which shall be filed by Charterer with Owner, the Mortgagee, the Indenture Trustee and American Petrofina) shall have the right to self-insure up to the first $500,000 of any loss resulting from any one accident or occurrence (other than an

actual or construtive total loss of the Vessel) covered under the marine and war risk hull and machinery policies.

(b) All policies of insurance under this Section shall, except as provided in subsection (f), provide that *(i)* until the insurers shall have received notice satisfactory to them from the Mortgagee, the Secretary, the Indenture Trustee or Owner that no Bonds are Outstanding all losses in excess of $100,000 shall be payable solely to the Mortgagee, *provided* that, in the event the First Mortgage shall have been assigned to the Secretary and the insurers shall have been notified, all losses in excess of $50,000 shall be payable solely to the Secretary, *(ii)* after the Bonds are no longer Outstanding but until the insurers shall have received notice satisfactory to them from the Indenture Trustee or Owner that no Loan Certificates are Outstanding, all losses in excess of $100,000, shall be payable solely to the Indenture Trustee, and *(iii)* after the Loan Certificates are no longer Outstanding and the insurers shall have been notified, all losses in excess of $100,000 shall be payable solely to Owner who shall make distribution as interests may appear. Notwithstanding any other provision of this Section 16, policies of single interest mortgagee insurance, owner's equity insurance and insurance against requisition of title of the Vessel referred to in clauses *(3)* and *(4)* of this Section 16 shall provide that losses are payable as if the Bonds were no longer Outstanding and shall be applied as if the Bonds had been paid in full (within the meaning of the Senior Indenture).

Any such insurance recoveries (for purposes of this subsection (b) "insurance recoveries" shall be deemed to include payments made by governmental bodies under subsection (i) of this Section 16), except as otherwise provided

in subsection (f), to which Owner, the Mortgagee or the Indenture Trustee shall be entitled shall be applied as follows:

(1) In the event that insurance becomes payable under such policies on account of an accident, occurrence or event not resulting in an actual or constructive total loss or an agreed or compromised

* * *

(n) Concurrently with the delivery of the Vessel under this Charter, on or before the first day of the month in which the Delivery Date occurs in each calendar year thereafter and at such other times as Owner, the Mortgagee, the Indenture Trustee or American Petrofina may reasonably request Charterer shall furnish to Owner, the Mortgagee, the Indenture Trustee, American Petrofina and the Secretary a detailed certificate or opinion (signed by a firm of marine insurance brokers qualifying under subsection (g) of this Section) as to the insurance maintained by Charterer pursuant to this Section, specifying the respective policies of insurance covering the same and stating, in effect, that such insurance complies in all respects with the applicable requirements of this Section.

(o) Nothing in this Section shall limit any additional insurance coverage which the United States may require pursuant to any other contract or agreement to which the United States and the Charterer are parties.

17. Loss. In the event that *(a)* the Vessel shall become an actual total loss or there is a constructive or an agreed or compromised total loss of the Vessel or *(b)* the Vessel shall sustain damage to an extent which, in Charterer's and American Petrofina's opinion, as determined in

good faith by duly authorized officers of Charterer and American Petrofina, respectively, makes repair of the Vessel not economically possible or renders the Vessel permanently unfit for normal use, then Charterer shall give notice thereof as required in Section 15 hereof and, in addition, shall give written notice to Owner (with copies to the Mortgagee, the Indenture Trustee, the holders of the Loan Certificates and the Secretary) of the termination of this Charter on any date occurring not more than 90 or, with American Petrofina's approval, 150 days after the occurrence of the event giving rise to such constructive, agreed or compromised total loss or of such actual total loss or of such determination. On the termination date specified in such written notice, Charterer will pay to Owner the Stipulated Loss Value for the Vessel determined as set forth in Section 21.2 hereof (plus, in the circumstances contemplated by clause *(b)* above, the premium, if any, payable on redemption of the bonds resulting therefrom) less any credit referred to in clause *(ii)* of Section 21.3 hereof.

* * *

21.2 *Stipulated Loss Value.* For purposes of Sections 16, 17, 19 and 27 hereof, the Stipulated Loss Value for the Vessel shall be equal to the sum of *(i)* the amount specified as of the Basic Hire Payment Date on or immediately preceding the termination date (or as of the Basic Hire Payment Date on or immediately preceding the particular date of determination in the case of Sections 16 and 27 hereof) in Schedule I annexed hereto, and *(ii)* in the case of Sections 17 and 19 hereof, if the termination date is not a Basic Hire Payment Date, an amount equal to interest computed at a rate per annum (computed on the basis of a 360-day year of twelve 30-day months) on the

amount referred to in clause *(i)* of this sentence from, but not including, the Basic Hire Payment Date immediately preceding the termination date to and including the termination date, which rate shall be the rate or respective rates of interest borne by the then Outstanding Bonds to the extent of the principal amount thereof, 9% to the extent of the then outstanding principal amount of the Loan Certificates and 12% as to the balance of such amount referred to in clause *(i)* of this sentence. In addition, for the purposes of both of the foregoing sentences, in the case of Sections 17 and 19 hereof, Charterer will pay the Basic Hire due on each Basic Hire Payment Date occurring prior to or on, but not after, the termination date, including the Basic Hire due on any such Basic Hire Payment Date occurring between the occurrence of the event giving rise to the payment of the Stipulated Loss Value of the Vessel and the termination date.

* * *

Schedule I
to
Bareboat Charter

SCHEDULE FOR DETERMINATION OF STIPULATED LOSS VALUE

The amount of Stipulated Loss Value referred to in clause *(i)* of Section 21.2 of the Bareboat Charter shall be, as of any Basic Hire Payment Date occurring after the Delivery Date, the amount below for such Payment Date.

Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value	Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value
1	$71,300,000	35	$77,600,000
2	71,900,000	36	74,800,000
3	72,500,000	37	72,700,000
4	73,200,000	38	73,200,000
5	73,800,000	39	73,700,000
6	74,400,000	40	74,200,000
7	72,400,000	41	74,700,000
8	73,000,000	42	75,200,000
9	73,600,000	43	73,000,000
10	74,200,000	44	73,500,000
11	74,800,000	45	74,000,000
12	75,400,000	46	74,500,000
13	73,400,000	47	74,900,000
14	74,000,000	48	75,400,000
15	74,500,000	49	73,300,000
16	75,100,000	50	73,700,000
17	75,700,000	51	74,200,000
18	76,300,000	52	74,600,000
19	74,200,000	53	75,100,000
20	74,800,000	54	75,500,000
21	75,400,000	55	73,400,000
22	75,900,000	56	73,800,000
23	76,500,000	57	74,200,000
24	77,000,000	58	74,700,000
25	75,000,000	59	75,100,000
26	75,500,000	60	72,200,000
27	76,000,000	61	70,000,000
28	76,600,000	62	70,400,000
29	77,100,000	63	70,800,000
30	77,600,000	64	71,200,000
31	75,600,000	65	71,700,000
32	76,100,000	66	72,100,000
33	76,600,000	67	69,900,000
34	77,100,000	68	70,300,000

Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value	Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value
69	$70,700,000	104	63,700,000
70	71,000,000	105	64,000,000
71	71,400,000	106	64,300,000
72	71,800,000	707	64,600,000
73	69,600,000	108	64,900,000
74	70,000,000	109	62,600,000
75	70,300,000	110	62,800,000
76	70,700,000	111	63,100,000
77	71,100,000	112	63,400,000
78	71,400,000	113	63,700,000
79	69,200,000	114	64,000,000
80	69,600,000	115	61,600,000
81	69,900,000	116	61,900,000
82	70,300,000	117	62,200,000
83	70,600,000	118	62,400,000
84	67,700,000	119	62,700,000
85	65,400,000	120	63,000,000
86	65,800,000	121	60,600,000
87	66,100,000	122	60,900,000
88	66,500,000	123	61,200,000
89	66,800,000	124	61,400,000
90	67,100,000	125	61,700,000
91	64,900,000	126	62,000,000
92	65,200,000	127	59,600,000
93	65,500,000	128	59,900,000
94	65,800,000	129	60,100,000
95	66,200,000	130	60,400,000
96	66,500,000	131	60,600,000
97	64,200,000	132	60,900,000
98	64,500,000	133	58,500,000
99	64,800,000	134	58,800,000
100	65,100,000	135	59,000,000
101	65,400,000	136	59,200,000
102	65,700,000	137	59,500,000
103	63,400,000	138	59,700,000

Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value	Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value
139	$57,400,000	173	$51,700,000
140	57,600,000	174	51,900,000
141	57,800,000	175	49,500,000
142	58,100,000	176	49,700,000
143	58,300,000	177	49,900,000
144	58,500,000	178	50,100,000
145	56,200,000	179	50,300,000
146	56,400,000	180	50,500,000
147	56,600,000	181	48,100,000
148	56,900,000	182	48,300,000
149	57,100,000	183	48,500,000
150	57,300,000	184	48,700,000
151	54,900,000	185	48,800,000
152	55,100,000	186	49,000,000
153	55,400,000	187	46,600,000
154	55,600,000	188	46,000,000
155	55,800,000	189	46,900,000
156	56,000,000	190	47,200,000
157	53,600,000	191	47,300,000
158	53,800,000	192	47,500,000
159	54,100,000	193	45,100,000
160	54,300,000	194	45,300,000
161	54,500,000	195	45,400,000
162	54,700,000	196	45,600,000
163	52,300,000	197	45,800,000
164	52,500,000	198	46,000,000
165	52,700,000	199	43,500,000
166	52,900,000	200	43,700,000
167	53,100,000	201	43,900,000
168	53,400,000	202	44,100,000
169	50,900,000	203	44,200,000
170	51,100,000	204	44,400,000
171	51,300,000	205	41,900,000
172	51,500,000	206	42,100,000

Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value	Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value
207	$42,300,000	241	$31,700,000
208	42,400,000	242	31,800,000
209	42,600,000	243	31,900,000
210	42,800,000	244	32,000,000
211	40,300,000	245	32,200,000
212	40,500,000	246	32,300,000
213	40,600,000	247	29,800,000
214	40,800,000	248	29,900,000
215	41,000,000	249	30,000,000
216	41,100,000	250	30,200,000
217	38,700,000	251	30,300,000
218	38,800,000	252	30,400,000
219	39,000,000	253	27,900,000
220	39,100,000	254	28,000,000
221	39,300,000	255	28,100,000
222	39,400,000	256	28,200,000
223	37,000,000	257	28,300,000
224	37,100,000	258	28,400,000
225	37,300,000	259	25,900,000
226	37,400,000	260	26,000,000
227	37,500,000	261	26,100,000
228	37,700,000	262	26,200,000
229	35,200,000	263	26,300,000
230	35,400,000	264	26,400,000
231	35,500,000	265	23,900,000
232	35,700,000	266	24,000,000
233	35,800,000	267	24,100,000
234	40,000,000	268	24,200,000
235	33,500,000	269	24,300,000
236	33,600,000	270	24,400,000
237	33,700,000	271	21,800,000
238	33,900,000	272	21,900,000
239	34,000,000	273	22,000,000
240	34,100,000	274	22,100,000

Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value	Basic Hire Payment Date (after Delivery Date)	Stipulated Loss Value
275	$22,200,000	288	$17,900,000
276	22,300,000	289	15,300,000
277	19,700,000	290	15,400,000
278	19,800,000	291	15,400,000
279	19,900,000	292	15,500,000
280	19,900,000	293	15,600,000
281	20,000,000	294	15,600,000
282	20,100,000	295	13,000,000
283	17,500,000	296	13,100,000
284	17,600,000	297	13,100,000
285	17,700,000	298	13,200,000
286	17,800,000	299	13,200,000
287	17,800,000	300	10,700,000

EXHIBIT H

INTERROGATORIES

1. With respect to each of the plaintiffs; state:

a. the address of the principal place of business; and

b. the names and addresses of each of their divisions.

a) Seatrain Lines, Inc., 1 Chase Manhattan Plaza, New York, New York; Seatrain Ship Building, Inc., 1 Chase Manhattan Plaza, New York, New York; Queensway Tankers, Inc., 2460 Lemoine Avenue, Fort Lee, New Jersey 07024; Cove Shipping, Inc., Wall Street Plaza, New York, New York 10005, Polk Tanker Corporation, 1 Chase Manhattan Plaza, New York, New York; East River Steamship Corporation, 2460 Lemoine Avenue, Fort Lee 07024, Queensway Tankers, Inc., 2460 Lemoine Avenue, Fort Lee, New Jersey 07024

b) See answer to a.

February 6, 1981

Guggenheimer & Untermyer, Esqs.
80 Pine Street
New York, New York 10005

Attention: Norman L. Greene, Esq.

Re: Seatrain v. Delaval

Dear Mr. Greene:

This is in reply to your letter of January 27, 1981 requesting supplemental answers to interrogatories heretofore answered.

1. With the exception of Seatrain Lines, Inc., none of the corporations named in 1(a) had any corporate divisions. Seatrain Lines, Inc. is the parent corporation of the companies named in 1(a).

3. My letter of December 30, 1980 and the documents submitted in answer to the interrogatory defines the ownership of each of the four ships. In addition, copies of charters were delivered to you.

5. The documents attached to the answer to this interrogatory are identified as follows: Purchase Order of Seatrain Shipbuilding Corp. to Delaval Turbine, Inc. dated 3/18/70; Letter from B. B. Cook, Jr., Vice President Delaval Turbine, Inc. dated 3/18/70 addressed to Seatrain

Lines, Inc., Requisition from Seatrain Shipbuilding Corp. addressed to Delaval Turbine Division dated 7/5/73; Three page mailgram dated 2/27/75 from Seatrain Shipbuilding corp. to Delaval, attention: Barton Cook; Two page mailgram dated 2/75 from Seatrain Shipbuilding Corp. addressed to John J. Beckett President c/o Transamerica Corp,. San

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54. (Cont.) It may be presumed that when Delaval agreed to design and manufacture the turbines and their component parts that the material used in their manufacture would be of sufficient strength and quality to avoid a malfunction. Under the circumstances it is hardly relevant as to who represented they were fit for the use intended. Also see Mr. Cook's letter of 3/18/70 and all other correspondence) See supplemental answer to interrogatory No. 41(c). Also see the following reports submitted by Lucius Pitkin, Inc. Metallurgist which are attached hereto and identified as follows:

Report dated 4/26/78 of their examination of the Reverse Blading, H. P. Turbine — T. T. Stuyvesant.

Report dated 8/1/78 of their examination of Reversing Blade Rings O T. T. Bay Ridge and ring segment T. T. Williamsburg.

Report dated 11/22/78 of their examination of Reversing Blade Rings — T. T. Williamsburg.

56. The plaintiffs have submitted all such agencies reports in its possession consisting of two reports made to

the U. S. Coast Guard, one covering the Stuyvesant Casualty and the second covering the Williamsburg casualty.

The information submitted here in may be used by the defendant as if sworn to or certified. This representation applies to all past or future answers to Interrogatories answered on behalf of the plaintiffs.

Very truly yours,

/s/ James T. Owens

JTO:jb
Enclosure

EAST RIVER STEAMSHIP CORP. — Incorporated New York, N. Y. — 9/5/73

Albert Guetta	President & Director
Renato Cohen	Vice President/Treasurer/Asst. Secy.
Irving S. Gordon	Vice President/Secretary
Felix Zonana	Asst. Secretary/Asst. Treasurer

KINGSWAY TANKERS, INC. — Incorporated New York, N.Y. — 10/23/73

Albert Guetta	President & Director
Renato Cohen	Vice President/Secretary/Asst. Treas.
Irving S. Gordon	Vice President/Treasurer/Asst. Secy.
Felix Zonana	Asst. Secretary/Asst. Treasurer

QUEENSWAY TANKERS, INC. — Incorporated Delaware — 6/29/77

Albert Guetta	President & Director
Irving S. Gordon	Vice President/Treasurer/Secy.
Felix Zonana	Asst. Treasurer/Asst. Secy.

RICHMOND TANKERS, INC. — Incorporated Delaware — 4/4/78

Albert Guetta	President & Director
Irving S. Gordon	Vice President/Treas./Secy.
Felix Zonana	Asst. Treasurer/Asst. Secy.

All above officers resigned April 18, 1979

	*Officers & Directors as of April 18, 1979
*John Corcacas	President & Director
*Joseph Perres	Vice President/Secy. & Director
*Israel Farkas	Vice President/Treas. & Director
*Charles J. Hess	Vice President
*Charles Nealis	Vice President
*Carmine Bracco	Vice President

All above Officers resigned February 11, 1980

	**Officers & Directors as of February 11, 1980
**Albert Guetta	President & Director
**Irving S. Gordon	Vice President/Treas./Secy.
**Felix Zonana	Asst. Treasurer/Asst. Secretary

EXHIBIT I

GUARANTY AGREEMENT

Guaranty Agreement, dated as of December 1, 1973, by Seatrain Lines, Inc., a Delaware corporation ("Seatrain"), with Wilmington Trust Company, a Delaware corporation ("Owner"), as Owner Trustee and Bankers Trust Company, a New York corporation ("Indenture Trustee"), as Indenture Trustee under the Indenture of Trust ("Indenture"), dated as of December 1, 1973, between Owner and Indenture Trustee:

Whereas, Seatrain Shipbuilding Corp., a New York corporation ("Builder"), is a wholly-owned subsidiary of Seatrain and Seatrain wishes Builder to sell the steam

screw bulk oil tanker named Brooklyn (the "Vessel") to Owner pursuant to the terms of the Participation Agreement (the "Participation Agreement"), dated as of December 1, 1973, among Seatrain, Langfitt Shipping Corporation ("Langfitt"), East River Steamship Corporation ("Charterer"), American Petrofina, Incorporated, General Electric Credit Corporation ("Owner Participant"), John Hancock Mutual Life Insurance Company ("Loan Participant"), Owner and Indenture Trustee;

Whereas, in order to finance the cost to Owner of acquiring the Vessel, Owner proposes *(a)* to issue and sell up to $26,500,000 aggregate principal amount of 9% Loan Certificates (the "Loan Certificates") to Loan Participant pursuant to the terms of the Indenture and up to $23,238,000 aggregate amount of investment participations to Owner Participant pursuant to the terms of the Trust Agreement (the "Trust Agreement"), dated as of the date hereof, between Owner and Owner Participant, and to assume the obligations of Langfitt under the United States Government Insured Merchant Marine Bonds, Brooklyn Issue, Series A, issued in connection with the financing of the Vessel and *(b)* to charter the Vessel to Charterer pursuant to the Bareboat Charter Party ("Bareboat Charter"), dated as of the date hereof, from Owner to Charterer; and

Whereas, Loan Participant is unwilling to purchase the Loan Certificates, Owner Participant is unwilling to make its investment in the Vessel and Owner is unwilling to purchase the Vessel and charter it to Charterer unless Seatrain enters in to this Agreement for the purpose of providing additional security for the Loan Certificates and for the payment of Hire (as such term and certain other capitalized

terms used herein without definition are defined in the Bareboat Charter) and for the performance of all other obligations of Charterer pursuant to the terms of the Bareboat Charter.

Now, therefore, in consideration of the premises, the parties hereto agree as follows:

1. Guaranty of Bareboat Charter, etc. 1.1. Seatrain unconditionally guarantees to Owner and Indenture Trustee the due and punctual performance of and compliance with all covenants, terms and conditions contained in the Bareboat Charter and the Participation Agreement to be performed or complied with by Charterer or Langfitt. Such guaranty is an absolute and unconditional guaranty of performance and compliance, is in no way conditioned upon any attempt to enforce performance or compliance by Charterer or Langfitt, and shall be binding upon and enforceable against Seatrain without regard to the validity or enforceability of the Bareboat Charter or the Participation Agreement or any term thereof.

1.2 Without limiting the generality of section 1.1, and without being limited thereby. Seatrain unconditionally guarantees to Owner and Indenture Trustee the due and punctual payment of all sums specified in the Bareboat Charter as payable by Charterer, including, without limitation, all Hire (including, without limitation, all amounts payable pursuant to Sections 10 and 20 of the Bareboat Charter) and all damages (whether provided for in the Bareboat Charter or otherwise allowed by law). Such guaranty is an absolute, unconditional, continuing guaranty of payment and not of collectibility, is in no way conditioned upon any attempt to collect from Charterer or upon any

other event or contingency, and shall be binding upon and enforceable against Seatrain without regard to the validity or enforceability of the Bareboat Charter or any term thereof. If Charterer shall fail or be unable duly and punctually to pay any such sum, Seatrain will forthwith pay the same, together with interest thereon at the rate of 12% per annum compounded quarterly (on the basis of a 360-day year of twelve 30-day months) from the due date thereof to the date of payment, to Indenture Trustee.

GUARANTY AGREEMENT

Guaranty Agreement, dated as of December 1, 1974, by Seatrain Lines, Inc., a Delaware corporation ("Seatrain"), with Wilmington Trust Company, a Delaware corporation ("Owner"), not in its individual capacity but solely as Owner Trustee:

Whereas, Seatrain Shipbuilding Corp., a New York corporation ("Builder"), is a wholly-owned subsidiary of Seatrain and Seatrain wishes Builder to sell the steam screw bulk oil tanker named Williamsburg (the "Vessel") to Owner pursuant to the terms of the Participation Agreement (the "Participation Agreement"), dated as of December 1, 1974, among Seatrain, Tyler Tanker Corporation ("Tyler"), Kingsway Tankers, Inc. ("Charterer"), American Petrofina, Incorporated, General Electric Credit Corporation ("Owner Participant"), Seatrain acting as a purchaser of the Loan Certificates hereinafter referred to ("Loan Participant"), Owner and Indenture Trustee;

Whereas, in order to finance the cost to Owner of acquiring the Vessel, Owner proposes *(a)* to issue and sell

up to $6,777,000 aggregate principal amount of Loan Certificates (the "Loan Certificates") to Loan Participant pursuant to the terms of the Indenture and up to $24,091,000 aggregate amount of investment participations to Owner Participant pursuant to the terms of the Trust Agreement (the "Trust Agreement"), dated as of the date hereof, between Owner and Owner Participant, to issue and sell up to $18, 423,000 aggregate principal amount of United States Government Guaranteed Ship Financing Bonds, Williamsburg Issue, to certain purchasers pursuant to purchase agreements between the Owner and the several purchasers dated the date hereof and to assume the obligations of Tyler under the United States Government Insured Merchant Marine Bonds, Williamsburg Issue, issued in connection with the financing of the Vessel and *(b)* to charter the Vessel to Charterer pursuant to the Bareboat Charter Party ("Bareboat Charter"), dated as of the date hereof, from Owner to Charterer; and

Whereas, Owner Participant is unwilling to make its investment in the Vessel and Owner is unwilling to purchase the Vessel and charter it to Charterer unless Seatrain enters into this Agreement for the purpose of providing additional security for the payment of Hire (as such term and certain other capitalized terms used herein without definition are defined in the Bareboat Charter) and for the performance of all other obligations of Charterer pursuant to the terms of the Bareboat Charter.

Now, therefore, in consideration of the premises, the parties hereto agree as follows:

1. Guaranty of Bareboat Charter, etc. 1.1. Seatrain unconditionally guarantees to Owner the due and punctual

performance of and compliance with all covenants, terms and conditions contained in the Bareboat Charter and the Participation Agreement to be performed or complied with by Charterer or Tyler. Such guaranty is an absolute and unconditional guaranty of performance and compliance, is in no way conditioned upon any attempt to enforce performance or compliance by Charterer or Tyler, and shall be binding upon and enforceable against Seatrain without regard to the validity or enforceability of the Bareboat Charter or the Participation Agreement or any term thereof.

1.2. Without limiting the generality of section 1.1, and without being limited thereby, Seatrain unconditionally guarantees to Owner the due and punctual payment of all sums specified in the Bareboat Charter as payable by Charterer, including, without limitation, all Hire (including, without limitation, all amounts payable pursuant to Sections 10 and 20 of the Bareboat Charter) and all damages (whether provided for in the Bareboat Charter or otherwise allowed by law). Such guaranty is an absolute, unconditional, continuing guaranty of payment and not of collectibility, is in no way conditioned upon any attempt to collect from Charterer or upon any other event or contingency, and shall be binding upon and enforceable against Seatrain without regard to the validity or enforceability of the Bareboat Charter or any term thereof. If Charterer shall fail or be unable duly and punctually to pay any such sum, Seatrain will forthwith pay the same, together with interest thereon at the rate of 13% per annum compounded quarterly (on the basis of a 360-day year of twelve 30-day months) from the due date thereof to the date of payment, to Owner.

1.3. In case the Bareboat Charter shall be terminated as a result of the rejection thereof by any trustee, receiver or liquidating agent of the Charterer or any of its properties in any bankruptcy, insolvency,

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GUARANTY AND SECURITY AGREEMENT

Guaranty and Security Agreement, dated as of August 15, 1977, by Seatrain Lines, Inc., a Delaware corporation ("Seatrain"), and Queensway Tankers, Inc., a Delaware corporation (the "Charterer"), with General Electric Credit Corporation, a New York corporation (the "Owner Participant"):

Whereas, Seatrain Shipbuilding Corp., a New York corporation ("Builder"), is a wholly-owned subsidiary of Seatrain and Seatrain wishes Builder to sell the steam screw bulk oil turbine tanker named Stuyvesant (the "Vessel"), to United States Trust Company of New York, not in its individual capacity but solely as Owner Trustee (the "Owner Trustee") under a Trust Agreement dated as of August 15, 1977 between the Owner Trustee and Owner Participant (the "Trust Agreement"), pursuant to the terms of the Participation Agreement (the "Participation Agreement"), dated as of August 15, 1977, among Seatrain, Polk Tanker Corporation ("Polk"), Charterer, Owner Participant and Owner Trustee and a Construction Contract Amendment and Assignment dated September 30, 1977 among Polk, the Builder and Owner Trustee;

Whereas, Charterer wishes to charter the Vessel from Owner Trustee pursuant to the Bareboat Charter Party

(the "Bareboat Charter"; terms defined in the Bareboat Charter have the same meanings when used herein) dated as of August 15, 1977 from Owner Trustee to Charterer;

Whereas, in order to finance the cost to Owner Trustee of acquiring the Vessel, Owner Participant proposes to make an investment in the ownership of the vessel of up to $32,600,000 pursuant to the terms of the Trust Agreement and Owner Trustee proposes (a) to issue and sell up to $31,355,000 aggregate principal amount of United States Government Guaranteed Ship Financing Bonds, Stuyvesant Issue, to certain purchasers pursuant to purchase agreements among Owner Trustee and the several purchasers dated as of the date hereof and to assume the obligations of Polk under the United States Government Insured Merchant Marine Bonds, Stuyvesant Issue, issued in connection with the financing of the Vessel, (b) to assume the obligations of Polk under the Polk Note issued by Polk to the Maritime Subsidy Board in repayment of construction differential subsidy paid pursuant to the Title V Contract, and (c) to charter the Vessel to Charterer pursuant to the Bareboat Charter; and

Whereas, Owner Participant is unwilling to make its investment in the Vessel and cause Owner Trustee to purchase the Vessel and charter it to Charterer unless Seatrain and Charterer enter into this Agreement for the purpose of providing additional security for the payment to Owner Participant of those amounts which Owner Participant is entitled to receive pursuant to the Bareboat Charter or the Trust Agreement and for the performance of certain other obligations of Charterer under the Bareboat Charter.

Now, therefore, in consideration of the premises, the parties hereto agree as follows:

1. Guaranty by Seatrain. 1.1. Seatrain unconditionally and irrevocably guarantees to Owner Participant the payment by Charterer of all amounts which owner Participant is entitled to receive pursuant to the Bareboat Charter or the Participation Agreement or which Owner Participant would have received if all amounts of Basic Hire, liquidated damages (*provided* that, for purposes only of this Agreement, the amount of liquidated damages payable under Section 27(b) of the Bareboat Charter shall be calculated by substituting the phrase "Tremination Value" for the phrase "Stipulated Loss Value" in clause (i) of such Section 27(b) if the Owner Trustee shall have recovered possession of the Vessel at the time payment of the Owed Amount in respect thereof is sought to be recovered from Seatrain or from the Letter of Credit hereinafter referred to), Stipulated Loss Value, Termination Value and any other Supplemental Hire payable pursuant to the Bareboat Charter had been paid in accordance with the terms thereof, and which the Owner Participant shall have failed to receive where such failure to receive such amounts shall constitute, shall have resulted in the occurrence of, or shall result from the occurrence of, an Event of Default; Seatrain shall pay on demand such amounts to Owner Participant (any such amounts which Owner Participant shall fail to receive where such failure to receive such amounts constitutes, shall have resulted in the occurrence of, or shall have resulted from the occurrence of, an Event of Default, being herein called "Owed Amounts"). Such guaranty is an absolute, unconditional irrevocable continuing guaranty of payment and not of collectibility, is in no way conditioned upon any attempt to collect from Charterer or upon any other event or con-

tingency, and shall be binding upon and enforceable against Seatrain without regard to the validity or enforceability of the Bareboat Charter or any term thereof.

1.2. In case the Bareboat Charter shall be terminated as a result of the rejection thereof by any trustee, receiver or liquidating agent of the Charterer or any of its properties in any bankruptcy, insolvency, reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar proceeding, Seatrain's obligations hereunder (other than under section 1.3 hereof) shall continue to the same extent as if the Bareboat Charter had not been so rejected.

1.3. In addition to, but without duplication of, its obligations under sections 1.1 and 1.2 hereof, Seatrain unconditionally and irrevocably guarantees to Owner Participant and the Owner Trustee the due and punctual performance of and compliance with all covenants, terms and conditions contained in the Bareboat Charter to be performed or complied with by Charterer and payment of any amounts (such amounts to be deemed Owed Amounts) expended by the Owner Trustee or the Owner Participant in connection with any action taken by the Owner Trustee pursuant to Section 28 of the Bareboat Charter *except* to the extent that such covenants, terms and conditions are solely for the benefit of the holders of the Bonds, the Guaranteed Bonds and the Third Mortgage Note, the Senior Indenture Trustee, the Depository, the Guaranteed Bond Trustee, the Secretary and the Secretary of Commerce. In particular, but only to such extent, Seatrain does not guarantee payment by Charterer of (a) Basic Hire, (b) Stipulated Loss Value, (c) Termination Value,

(d) any premium referred to in the last sentence of Section 17 of the Bareboat Charter, (e) any Supplemental Hire payable under the last sentence of Section 3(d) of the Bareboat Charter in respect of any payments referred to in clauses (a) through (h) of this section 1.3 which are not paid when due, (f) any amounts payable by Charterer pursuant to Section 20.1 of the Bareboat Charter which are in respect of, in lieu of or substantially the equivalent of any other payment referred to in clauses (a) through (h) of this section 1.3, (g) any amount pursuant to Section 20.9 of the Bareboat Charter or (h) any liquidated damages payable under Section 27(b) of the Bareboat Charter. The exception contained in the two preceding sentences shall in no way be construed as limiting the obligations of Seatrain contained in sections 1.1 and 1.2 hereof.

1.4. Seatrain will pay, on demand by Owner Participant, all costs and expenses incurred (including, without limitation, reasonable attorneys' fees and expenses) in connection with the enforcement of the obligations of Seatrain under this Agreement, which costs and expenses shall be deemed to be Owed Amounts.

2. Obligations of Seatrain Absolute, etc. The obligations of Seatrain hereunder shall be absolute, unconditional and irrevocable, shall not be subject to any counterclaim, setoff, deduction or defense based upon any claim Seatrain may have against the Owner Trustee, Owner Participant, Charterer or any other person, and shall remain in full force and effect without regard to, and shall not be released, discharged or in any way affected by any circumstances or condition (whether or not Seatrain shall have any knowledge or notice thereof), including, but not lim-

ited to: (a) any amendment or modification of or supplement to the Participation Agreement, the Time Charter, the Time Charter Assignment, the Bareboat Charter, the Trust Agreement, the Bonds the Guaranteed Bonds, the Secretary's Note, or the Third Mortgage Note, any agreements relating to the Bonds, the Guaranteed Bonds, the Secretary's Note, or the Third Mortgage Note, or any other instrument or agreement applicable to the Owner Trustee or to the Vessel or any part thereof, or any assignment or transfer of any thereof, or any furnishing or acceptance of additional security, or any release of any security; (b) any failure on the part of the Owner Trustee, Owner Participant or Charterer, or any other person to perform or comply with any terms of any such instrument or agreement; (c) any waiver, consent, change, extension, indulgence or other action or inaction under or in respect of any such instrument or agreement, or any exercise or nonexercise of any right, remedy, power or privilege under or in respect of any such instrument or agreement, or this Agreement, whether or not Charterer or Seatrain has notice or knowledge of any of the foregoing; (d) any bankruptcy, insolvency, reorganization arrangement, readjustment, composition, liquidation or similar proceeding with respect to the Owner Trustee, Owner Participant or Charterer or its properties or its creditors, or any action taken by any trustee or receiver or by any court in any such poceeding; (e) any limitation on the liability or obligations of Charterer under the Bareboat Charter (other than any limitation

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GUARANTY AGREEMENT

Guaranty Agreement, dated as of March 15, 1979, by Seatrain Lines, Inc., a Delaware corporation *("Seatrain")*, with United States Trust Company of New York, a New York corporation not in its individual capacity but solely as Owner Trustee *("Owner")*:

Whereas, Seatrain Shipbuilding Corp., a New York corporation *("Builder")*, and Fillmore Tanker Corporation, a Delaware corporation *("Fillmore")*, each of which is directly or indirectly a wholly-owned subsidiary of Seatrain, have entered into a Construction Contract dated as of June 23, 1973, as amended, and Fillmore wishes the steam screw bulk oil turbine tanker named Bay Ridge (the *"Vessel")* to be sold to United States Trust Company of New York, not in its individual capacity but solely as Owner Trustee under a Trust Agreement dated as of March 15, 1979 among United States Trust Company of New York, in its individual capacity, Security Pacific Equipment Leasing, Inc. *("Security Pacific")* and American Road Equity Corporation *("AMREC"*, and together with Security Pacific *"Owner Participants")* (the *"Trust Agreement")*, pursuant to the terms of the Participation Agreement (the *"Participation Agreement")*, dated as March 15, 1979, among Seatrain, Fillmore, Charterer, the Loan Participant, Owner Participants, United States Trust Company of New York, in its individual capacity, and Owner and a Construction Contract Amendment and Assignment dated the Delivery Date among Fillmore, the Builder and Owner;

Whereas, Charterer wishes to charter the Vessel from Owner pursuant to the Bareboat Charter Party (the *"Bareboat Charter"*; terms defined in the Bareboat Charter have the same meanings when used herein) dated as of March 15, 1979 between Owner and Charterer;

Whereas, Owner is unwilling to purchase the Vessel and charter it to Charterer unless Seatrain enters into this Agreement for the purpose of providing additional security for the payment of certain amounts payable by Charterer pursuant to the terms of the Bareboat Charter.

Now, Therefore, in consideration of the premises, the parties hereto agree as follows:

1. Guaranty. 1.1. For purposes of this Agreement (i) the term *"Guaranteed Payments"* shall mean (a) Basic Hire, (b) the amounts payable by Charterer pursuant to Sections 17 and 19 of the Bareboat Charter and (c) the amounts of liquidated damages payable by Charterer pursuant to Section 27(a)(ii) of the Bareboat Charter *("Liquidated Damages")* and (ii) the term *"Title XI Payments"* shall mean the amounts payable by Charterer pursuant to clause (i) of the second paragraph of Section 20.1 of the Bareboat Charter.

1.2. Seatrain unconditionally and irrevocably guaranties to Owner the due and punctual payment by Charterer when due in accordance with the terms of the Bareboat Charter of (a) one-half of that portion of each Guarantied Payment which, if the entire such Guarantied Payment had been duly made by Charterer in accordance with the terms of the Bareboat Charter would, pursuant to the Security Agreement and the Depository Agreement, be applied to the payment of the principal of, or interest or premium (if any) on, the Bonds or the Secretary's Note and one-half of each Title XI Payment, and (b) that por-

tion of each Guarantied Payment which, if the entire such Guarantied Payment had been duly made by Charterer in accordance with the terms of the Bareboat Charter would, pursuant to the Security Agreement, the Second Security Agreement and the Depository Agreement, be applied to the payment of the principal of, or interest or premium (if any) on, the Second Mortgage Note.

Notwithstanding anything to the contrary contained in this Agreement, in the event that Charterer shall pursuant to Section 27(a)(ii) of the Bareboat Charter become obligated to pay Liquidated Damages, the obligation of Seatrain under clause (b) of the first paragraph of this section 1.2 in respect of Accelerated Hire (as hereinafter defined) shall consist exclusively of an obligation to pay Seatrain Accelerated Hire (as hereinafter defined), and to pay interest on the unpaid balance from time to time of Seatrain Accelerated Hire, from the payment date referred to in the first sentence of such Section 27(a)(ii) (the *"Accelerated Hire Payment Date"*), at the rate of 9.9375% per annum (calculated on the basis of a 360-day year of twelve 30-day months), in consecutive semiannual installments of principal and interest (the amount of each such installment to be applied first to the payment of accrued interest to the date for the payment of such installment) on . . .

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.
80-238
(Hon. Lawrence A.
Whipple)

SEATRAIN LINES, INC., a Delaware Corporation; SEATRAIN SHIPBUILDING CORP., a Delaware Corporation; EAST RIVER STEAMSHIP CORP., a Delaware Corporation; KINGSWAY TANKERS, INC., a Delaware Corporation; QUEENSWAY TANKERS, INC., a Delaware Corporation; RICHMOND TANKERS, INC., a Delaware Corporation; LANGFITT SHIPPING CORPORATION, a New York Corporation; TYLER TANKER CORPORATION, a Delaware Corporation; POLK TANKER CORPORATION, a Delaware Corporation; FILLMORE TANKER CORPORATION, a Delaware Corporation,

Plaintiffs

-against-

DELAVAL TURBINE, INC., now known as TRANSAMERICA DELAVAL, INC., a Delaware Corporation

Defendant

AFFIDAVIT
OF
CHARLES NEALIS

State of New Jersey)
) ss.
County of Essex)

CHARLES NEALIS, being of full age and duly sworn, upon his oath deposes and says:

1. I am presently employed by Hudson Waterways, Inc., a wholly owned subsidiary of Seatrain Lines, Inc., as a Vice President of Engineering which position generally

entails the overseeing of the operation of the vessels operated by or for Seatrain Lines, Inc. or its subsidiaries. I have been employed by this corporation since approximately 1962 or 1963. I am also licensed by the Coast Guard as a Chief Engineer.

2. In addition to being familiar with the operations of the various ships hereinabove referred to, I am familiar with all of the engineering aspects which are involved in the claim against the defendant, Delaval, as the same relates to the T.T. Brooklyn, T.T. Williamsburgh, T.T. Stuyvesant, and T.T. Bay Ridge. I am also the person who has been assisting counsel for the plaintiffs in the obtaining of the various documents, information, and other data which is material to the presentation of this action.

3. The turbines, both the HP (high pressure) and the LPs (low pressure) which were installed in the four above identified ships, were all acquired from the defendant, Delaval. I am not personally familiar with nor do I possess personal information relative to any conversations or agreements, written or otherwise, which may have been entered into between any of the parties relative to the sale of the involved turbines. Mr. Thomas Haller is the person who I believe negotiated with Delaval relative to the obtaining of the involved turbines.

4. The turbines to which I refer are the main power units which propel the involved ships.

5. On or about December 11, 1977 I received certain information relative to an episode which occurred involving the Stuyvestant as that ship was preparing to enter the port of Valdez. A certain loud noise was heard emanating from the area of the HP turbine, and in addition thereto,

super heated steam was detected as leaking from that same turbine. I am attaching hereto a copy of the submission of Alfred Case who was the Second Assistant Engineer on the Stuyvesant at this time.* I could not tell nor as far as I know no one else could determine just what the source of the problem was or in fact whether there was a problem with the turbines at that particular time. After berthing at Valdez on December 11, 1977, all of the bolts around the area from whence the super heated steam was escaping were tightened and secured, and after a cargo of oil was loaded onto the Stuyvesant, the Stuyvesant departed from Valdez on December 13, 1977. Shortly after departure major problems occurred relative to the operation and maneuverability of the Stuyvesant to such a degree that the actual safety of the vessel and crew was put at serious issue. I, of course, was not aboard the Stuyvesant at this time but I am attaching hereto a letter of the ship's captain, Franklin P. Liberty, which generally sets forth the over-all conditions experienced. As the Stuyvesant attempted to continue its voyage, arrangements were made on December 25, 1977 for certain personnel knowledgeable in the operations of the involved turbine to be helicoptered aboard the Stuyvesant. Those personnel were Patrick O'Shea, representing Seatrain Shipbuilding Corp.; Stanley Christensen, Port Manager for Cove Shipping, Inc. (the operators of the Stuyvesant); and Mr. Ballan, representing Delaval. These persons were dispatched to the Stuyvesant to assist in determing the cause or reason for the malfunctioning of the involved turbine. The Stuyvesant continued its voyage to Panama where it discharged its cargo, and thereafter on January 27, 1978 the Stuyvesant was placed in a berth at the Triple A Shipyard in

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*Also attached is the submitted report of Rufus H. Cobb.

San Francisco where the involved turbine was opened, examined and inspected. Generally stated, it was determined that the first stage steam reversing ring had in effect "disintegrated" and by so doing caused additional damage to other parts of the involved turbine.*

Prior to the arrival on January 27, 1978 at the Triple A Shipyard various possible causes of the involved damage were reviewed as the result of which arrangements had been theretofore made for certain turbine parts to be taken from the T.T. Bay Ridge which at this time was still under construction at Seatrain Shipbuilding Corp.'s facility in Brooklyn, New York. A first stage steam reversing ring was in fact taken from the Bay Ridge, transported to San Francisco and installed in the Stuyvesant. For all intents and purposes, the "ring" which was taken from the Bay Ridge was a new ring, the Bay Ridge not having been operational even as far as a sea trial was concerned.

The damage to the turbine was repaired and the new parts taken from the Bay Ridge were installed.

6. After departing the Triple A Shipyard on February 2, 1978, the Stuyvesant again became operational until April 8, 1978 when it again entered the Triple A Shipyard and at which time the involved H.P. turbine was again opened and inspected, and a determination was made that the first stage steam reversing ring which was then in the Stuyvesant, which was the ring installed originally in the Bay Ridge and was removed from the Bay Ridge and installed in the Stuyvesant as above stated and was found

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* The cause of this damage could not be determined at this time by any representatives of the owner.

to be damaged even though it was installed for only a period of approximately 8-9 weeks.

That ring was then removed from the Stuyvesant and the ring which theretofore had been installed in the Brooklyn and which was removed from the Brookly and transferred to Triple A Shipyard and which was reinforced and modified at the shipyard in accordance with the instructions of and under the supervision of Delaval personnel. After determining all additional damage to the turbine, interim repairs were made and the Stuyvesant departed the Triple A Shipyard on April 11, 1978 and remained operational until August 13, 1978, at which time an inspection of the involved turbine was made and the "Brooklyn" ring was removed and there was then installed a ring which had theretofore been newly designed and manufactured by Delaval. The design of this new ring was materially different from the ring originally designed and manufactured.

7. In point of chronology — The determination that the "ring" had disintegrated which was designed, manufactured, and installed by Delaval was first made in the Stuyvesant on January 27, 1978. Subsequent to but proximate to this date, e.g. March and April, 1978 and as a result of the determinations made as a result of the inspection of the Stuyvesant H.P. turbine, inspections were made of the H.P. turbines on the Brooklyn and the Williamsburg. These inspections of the other two ships determined that the involved rings were in the process of coming apart and that in all probability, but for this inspection, the Brooklyn and Williamsburg would have experienced similar types of circumstances as were experienced by the Stuyvesant. The Bay Ridge, as previously stated, was still under construc-

tion and as will be mentioned hereafter at the time the Bay Ridge became operational its H.P. turbine possessed the newly designed and manufactured first stage steam reversing ring.

I, together with persons expert in the design and construction of turbines, conferred and met with with representatives of Delaval relative to the design of these involved rings, subsequent to which and as a result of these meetings Delaval in fact did redesign the ring in accordance with the recommendations made and the newly designed rings were thereafter installed in all four of the involved ships.

8. During the discussions with Delaval I, together with other representatives of these plaintiffs, was advised that the "rings" which were installed in the LP turbines were of such a design that it was determined that such rings in the LP turbines were insufficient to perform as intended and that these rings also had to be redesigned and properly manufactured. The redesigning of these LP rings in fact did occur and were thereafter manufactured by Delaval and thereafter installed in all four of the involved tankers.

The turbines to which I have been referring were turbines which were in fact manufactured at the Delaval facility at Trenton, New Jersey, and at the time these turbines arrived at the ship construction site, they were all encased and ready for ship installation. The factual circumstance which govern the manufacturing and supplying of these turbines was not such that any part of the turbine was either manufactured or installed at ship site. That whole unit which was in fact received from Delaval was installed as a unit which said unit, of course, required the connecting of certain piping and other valves prior to the supplied turbine becoming operational.

9. I do also know that the turbines were in fact installed on each of the four referred to tankers under the direct supervision of the Delaval representative who was present at ship site and who oversaw these installations.

The charge made by Delaval for the newly designed and constructed HP first stage steam reversing ring was $38,300 and the LP ring $32,000. I do not recall, if in fact I ever knew what the cost of construction of the originally improperly designed HP or LP ring was, but it is my belief that the cost of the original construction was proximate to the cost of the properly designed rings which were ultimately installed in the involved ship. The actual change in design so as to make these rings proper for their intended purpose was relatively simple and as far as I can presently determine this revised design has resulted in the supplying of a ring which permits the proper functioning of all of the involved turbines.

10. The cost of the turbine unit as was supplied to each ship was approximately $1,400,000. The cost of the construction of the entire ship into which a turbine unit was installed was proximate to $125,000,000, and it is an absolute fact that in the absence of a functioning turbine unit that ship, the cost of which I have just approximated, is inoperable and not usable for its intended purpose. As I have heretofore stated, the turbine unit is that unit which causes the propulsion of the ship. Assuming but without agreeing, that the cost of the manufacture of the defectly designed rings was less than the cost to manufacture the properly designed rings, the difference cannot exceed at very best a few thousand dollars, and it was because of the

defective design and manufacture of the involved rings that these $100,000,000 plus ships were caused to be either placed out of service or have their intended performance drastically reduced.

/s/ Charles Nealis

Sworn to and subscribed before
me this 3rd day of June, 1981

/s/
Attorney at Law of New Jersey

January 13, 1981

To Whom It May Concern:

I joined the T. T. STUYVESANT on or about December 5, 1977 in Long Beach, Calif. as 2nd A/E. It was the second time I had been on the Vessel as 2nd A/E. The first time was on the maiden voyage from New York to San Francisco. The trip up to Valdez from Long Beach was normal with no major problems. We had arrived in Valdez on December 11th, 1977. As Captain Liberty had the pilots clearance we did not have to slow down at arrival. When we did proceed up to the dock and the maneuvering area I was not in the Engine Room. Upon relieving the 3rd A/E Rufus Cobb at 1550 he informed me that upon slowing down they had heard a loud very severe noise. As soon as I entered the EOS station, I detected a much higher temperature which indicated to me that we had developed a severe steam leak. I went down around the main engine and by using a broom found the leaks around the joint on the H. P. valve chest. After securing the engine at F.W.E. the Chief Engineer had some shore side personnel, who had been making the trip with us hammer down on the bolts to the chest

with slugging wrenches and a chain fell. After loading our alloted cargo we left the dock for our trip down to Panama.

As we started to maneuver we noticed we had to have a very high than normal 1st stage pressure to get the desired revolution for the bell demand and at about 60 Revs we got severe vibrations from the turbine. After some time it was decided to proceed to Panama at 50 Revs. A few days out of Valdez we had very heavy weather. On a 12-4 PM watch we had a black out. All this of course happened after the original indications of severe problems with the turbine. At no time did we have a carry over. During this storm the seas had carried away the emergency cut off switch to the circulator that were mounted by the lifeboats on the main deck. This could have been the cause of our black out After restoring power we proceed to make the trip to Panama and back up to San Francisco shipyard (AAA) at 50 Revs.

/s/ Alfred Case
2nd A/E
BAY RIDGE

Also Rufus H. Cobb Report

January 13, 1981

Rufus H. Cobb, I joined the ship T.T. STUYVESANT At Long Beach, California as Third Assistant Engineer on or about December 5, 1977, for Valdez. We had a normal trip North. After we had taken arrival outside and were proceeding on in, I was on watch, it was the P.M. watch on or about the 11th December 1977. I heard a very loud banging noise and a dragging or grinding sound followed for a

very short time. And the 1st Stage pressure was higher than normal.

We proceeded on to the dock. There was some leakage around the nozzle block. After finishing with engine the Chief had the riding shore gang tighten up on the nozzle block. After loading we got under way and found that we couldn't speed up normal, it was necessary to gradually warm up and increase the speed to prevent a loud scraping noise. In the Gulf of Alaska, we lost the plant completely. Bad weather had knocked the remote auxiliary circulating switch off the bulkhead ouside the house. After getting the plant back we proceeded on to Panama, discharged the cargo and proceeded to AAA at San Francisco at a speed of 50 RPM and at no time did we have carryover.

/s/ Rufus H. Cobb

Also Alfred Case Report

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26 December 1977

Mr. Andrew Garbis, Vice President
Cove Shipping, Inc.
99 Pine Street
New York, NY 10005

Dear Andy,

Happy Holidayfff Yesterday we picked up Pat Shea and Mr. Christensen by helicopter, off Los Angeles and sent Richard Keefe ashore for hospitalization, reports are in mail.

The trip down from Cape Hinchinbrook to Los Angeles was a Captain's Nightmare, as you undoubtedly gathered from the few conversations we had, normally with

turbine trouble the turbine is your only concern, but to have trouble with your turbine and be in a major storm is compounding your miseries. We were endeavoring to get the turbine up to speed but could not due to excessive vibration and not knowing the extent of damage did not rein at vibrating speed but brought turns down below vibrating speed. While all this is happening we are drifting, quite rapidly, toward the lee shore of the Gulf of Alaska and because we couldn't get enough speed to maintain headway we didn't have too much time left, that's why I wanted to have tugs alerted because we were in immiment danger and would remain so until such time as we could get enough revolutions to be able to make headway westward away from shore and a break in the weather. The storm was a major one, with mountainous seas at least sixty five feet, fortunately we did get enough speed to move, albeit slowly, so we have a happy ending. We will continue our slow pace to Bahia Parita, think our twelve day trip from Hinchinbrook to Los Angeles must be some kind of record—for turtles!

Best personal regards to all,

/s/ Franklin P. Liberty
Master

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-238

(Hon. Lawrence A. Whipple)

SEATRAIN LINES, INC., a Delaware Corporation; SEATRAIN SHIPBUILDING CORP., a Delaware Corporation; EAST RIVER STEAMSHIP CORP., a Delaware Corporation; KINGSWAY TANKERS, INC., a Delaware Corporation; QUEENSWAY TANKERS, INC., a Delaware Corporation; LANGFITT SHIPPING CORPORATION, a New York Corporation; TYLER TANKER CORPORATION, a Delaware Corporation; Polk Corporation, a Delaware Corporation; FILLMORE TANKER CORPORATION, a Delaware Corporation,

Plaintiffs,

—against—

DELAVAL TURBINE, INC., now known as TRANSAMERICA DELAVAL INC., a Delaware Corporation,

Defendant.

REPLY AFFIDAVIT IN
SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT E. SMITH, being duly sworn, deposes and says:

1. I am a member of the firm of Guggenheimer & Untermyer, which along with the firm of Kasen and Kraemer, are attorneys for defendant Delaval Turbine, Inc.,

now known as Transamerica Delaval, Inc. ("Delaval"). I am fully familiar with the facts and circumstances hereinafter set forth and submit this reply affidavit in support of Delaval's motion pursuant to Fed.R.Civ.P. 56(b) for an order granting defendant summary judgment and dismissing the Complaint.

2. Plaintiffs have conceded that the purchase of the turbines from Delaval was negotiated on their behalf by Thomas Haller. *See* Affidavit of Charles Nealis, sworn to on June 3, 1981 at ¶ 3, p. 2; Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment at p. 27. Mr. Haller so testified at his deposition taken on April 16, 1981:

"Q. During the negotiations you were acting on behalf of Seatrain Shipbuilding?

A. Yes.

Q. Were you also acting on behalf of Seatrain Lines?

A. Yes.

Q. Were you acting on behalf of any other plaintiffs in this case?

A. All of them that are connected with the case, as far as Seatrain Lines is concerned.

Q. So your answer is that you were acting on behalf of all the plaintiffs in this case; is that correct?

A. I have to say yes because I can't separate them. You can." (Transcript of Haller Deposition at pp. 96-97).

Plaintiffs were so interlinked that Mr. Haller could not distinguish between them:

"Q. The turbines for the STUYVESANT, WILLIAMSBURGH, BAY RIDGE and BROOKLYN were sold to Seatrain Lines; is that correct?

A. I am not sure of the nature of the transaction insofar as the specific purchaser I thought was Seatrain Shipbuilding Corporation. It may very well have been mixed up in the correspondence.

• • •

A. Well, they were looked upon as one and the same thing in those days. It was difficult to unthread one from the other." (Transcript of Haller Deposition at pp. 46-47).

3. The contract for the purchase of the tankers includes a letter dated March 18, 1978 from B. B. Cook, Jr., Vice President of Delaval to Seatrain Lines Inc., Attention: Mr. H. T. Haller, Vice President of Engineering. *See* Exhibit C to Moving Affidavit of Robert E. Smith, sworn to on May 18, 1981 (the "Mov. Aff."). A copy of the letter was Exhibit 2 at Mr. Haller's deposition.

In his capacity as the negotiator, Mr. Haller was concededly aware of the limitation provisions of the contract, which are found at page 2, paragraph 7 of the above letter:

"Q. And they were all aware of the guarantee provisions at the time of the negotiations?

A. I don't know.

Q. You were acting on their behalf?

A. I was acting on their behalf.

Q. And you were aware?

A. I was aware."

(Transcript of Haller Deposition, p. 97)

Mr. Haller testified that he participated in negotiations over terms of the March 18 letter (at p. 47):

"Q. Were there any negotiations over the terms of Defendant's Exhibit 2 for identification?

A. Negotiations?

Q. Yes.

A. Yes, there were negotiations.

Q. Did you participate in them?

A. Yes.

• • •

Q. Where did the negotiations take place?

A. The ones that are referred to here took place in my office in the Brooklyn Navy Yard."

The letter became part of the contract between the parties:

"Q. I show you Defendant's Exhibit 2 for identification and ask you whether you can identify it.

A. It appears to be the proposal Delaval made to Seatrain Shipbuilding Corporation for the supply of the main propulsion units for the tankers involved.

Q. Was that the contract between the parties?

A. It's part of it. I should think that it constitutes a portion of the contract. There is a purchase order format and there is a technical proposal which also were attached, one to the other, and became the purchasing medium."

(Transcript of Haller Deposition at pp. 45-46)

Mr. Haller noted that at all relevant times he was aware that the guarantee was of narrow scope:

"Q. Were there any negotiations concerning the guarantees which Seatrain Shipbuilding would receive from Delaval?

• • •

A. I discussed it plenty of times with them, telling them how ridiculous it was to have stated the guarantees in such a form that the vessel couldn't sail out of the shipyard and be guaranteed.

• • •

Q. And you were fully aware of this poor quality guarantee, as you describe it, at the time that you entered into the contract?

A. I was, and I repeat that I wasn't in a position or did not have the authority to change this or to operate on it in any respect."

(Transcript of Haller Deposition at pp. 95-96).

Mr. Haller testified that he was not aware of any objection to the limitation provision (paragraph 7, p. 2 of March 18 letter) by plaintiffs:

"Q. Are you aware of any objections to paragraph 7 interposed by any person on behalf of plaintiffs?

• • •

A. No."

(Transcript of Haller Deposition at pp. 49-50).

4. The Stuyvesant, Williamsburgh, Bay Ridge, and Brooklyn all were equipped with machinery to lift the cover of their turbines. As Mr. Haller testified at his deposition:

"Q. Is there rigging built into the machinery space to permit the lifting of the high pressure turbine cover?

A. The high pressure turbine cover can be lifted with the available structure.

• • •

A. The vessels were designed with a crane that could lift the LP turbine cover.

Q. So all four ships can have LP and HP turbine repairs without dry docking?

A. Yes." (Transcript of Haller Deposition at pp. 117-118).

See also transcript of deposition of Patrick O'Shea, taken on April 30, 1981, at p. 45 (with respect to the Stuyvesant):

"Q. Are you indicating that there is equipment on the ship which permits you to lift the casings of those turbines without a crane?

A. Sure."

Mr. O'Shea was employed as Machinery Supervisor and Machinery Superintendent of Seatrain Shipbuilding from December 1972 to July 1979. (Transcript of O'Shea Deposition, at p. 5).

/s/ Robert E Smith

Sworn to before me this 5th day of June, 1981

/s/ Virginia Petrick
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-238

(Hon. H. Curtis Meanor)

EAST RIVER STEAMSHIP CORP., et al.,

Plaintiffs,

-against-

DELAVAL TURBINE, INC., now known as TRANSAMERICA DELAVAL, INC., a Delaware Corporation,

Defendant.

NOTICE OF MOTION FOR REARGUMENT OR, IN THE ALTERNATIVE, FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

TO: Law Offices of
THOMAS E. DURKIN, JR., ESQ.
Attorney for Plaintiffs
Gateway I
Newark, New Jersey 07102

PLEASE TAKE NOTICE that upon the affidavit of Robert E. Smith, sworn to on November 17, 1982, the exhibits annexed thereto, and the pleadings and prior proceedings herein, defendant will move in this Court, before the Honorable H. Curtis Meanor, at the United States Courthouse, Newark, New Jersey, on December 13, 1982 at 10:00 a.m. or as soon thereafter as counsel can be heard, for (1) an order granting reargument of this Court's determination in its opinion filed October 5, 1982 (the "Opinion"), to the extent that it denied defendant's mo-

tion for summary judgment pursuant to Fed. R. Civ. P. 56(b) dismissing the Fifth Count of the Second Amended Complaint (the "Fifth Count"); (2) upon reargument, for an order granting defendant summary judgment pursuant to Fed. R. Civ. P. 56(b) dismissing the Fifth Count, on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment on that Count as a matter of law; and (3) if summary judgment dismissing the Fifth Count is denied, for certification of the order to be entered on the Opinion with respect to the Fifth Count pursuant to 28 U.S.C. § 1292(b), on the grounds that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order my materially advance the ultimate termination of the litigation.

Dated: November 18, 1982

KASEN AND KRAEMER
A Professional Corporation

/s/ Waldron Kraemer
1180 Raymond Boulevard
Newark, New Jersey 07102
(201) 624-5701

GUGGENHEIMER &
UNTERMYER
80 Pine Street
New York, New York 10005
(212) 344-2040
Attorneys for Defendant
Delaval Turbine, Inc.,
now known as Transamerica
Delaval, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-238

(Assigned to Hon. H. Curtis Meanor)

EAST RIVER STEAMSHIP CORP., et al.,

Plaintiffs,

vs.

DELAVAL TURBINE INC., now known as TRANSAMERICA DELAVAL INC., a Delaware Corporation,

Defendant.

AFFIDAVIT IN SUPPORT OF MOTION FOR REARGUMENT OR, IN THE ALTERNATIVE, FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

STATE OF NEW YORK)
) ss. :
COUNTY OF NEW YORK)

ROBERT E. SMITH, being duly sworn, deposes and says:

1. I am a member of the firm of Guggenheimer & Untermyer, which along with the firm of Kasen and Kraemer, are attorneys for defendant Delaval Turbine, Inc., now known as Transamerica Delaval, Inc. ("Delaval"). I am fully familiar with the facts and circumstances set forth below and submit this affidavit in support of Delaval's motion for reargument of this Court's determination in its opinion filed October 5, 1982 with re-

spect to the Fifth Count of the Second Amended Complaint (the "Fifth Count"), and upon reargument, for an order granting defendant summary judgment and dismissing the Fifth Count pursuant to Fed. R. Civ. P. 56(b). Alternatively, Delaval moves for certification of the order to be entered on the opinion to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(b). The question of law to be presented on appeal and to be set forth in the order pursuant to Third Circuit Rule 23 is as follows:

> "Whether plaintiff ship charterer has a valid cause of action in tort as alleged in the Fifth Count of the Second Amended Complaint against defendant manufacturer and seller of turbines for the recovery of damages which consist entirely of economic loss allegedly attendant to turbine difficulty?"

2. The astern guardian valve is part of the main propulsion unit which Delaval supplied to Seatrain Shipbuilding Corp. As the Second Amended Complaint (at ¶8(b), incorporated by reference with respect to the Bay Ridge at ¶11(b)) states:

> "The defendant . . . did supply a product, which said product was a fully installed main propulsion unit e.g., the high pressure and low pressure turbine together with certain appurtenances including but not limited to a certain guardian valve . . . ."

See also transcript of deposition taken on April 23, 1981 of Charles R. Nealis, Vice-President of Engineering of Hudson Waterways, a subsidiary of Seatrain Lines, Inc.,* who testified on behalf of plaintiffs (at p. 225):

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* See Nealis deposition at pp. 4-5.

> "I do know that Delaval supplied a unit to the shipyard, had supervision during the installation, and at the time of this casulty [to the Bay Ridge] a part of the unit supplied by Delaval was found installed backwards, namely, the astern guardian valve."

3. The main propulsion unit for the Bay Ridge was supplied by Delaval pursuant to a single contract of sale. See Affidavit of Robert E. Smith, sworn to on May 18, 1981, at ¶7 and Exhibits C and D annexed to the affidavit, submitted in support of Delaval's motion for summary judgment. The contract of sale initially encompassed the sale of the main propulsion units for the ships known as the Brooklyn, the Williamsburg and the Stuyvesant, and was subsequently applied to the sale of the unit for the Bay Ridge. *Id.*

4. The astern guardian valve is located between the low and high pressure turbines of the Bay Ridge. See deposition of Patrick O'Shea, former machinery superintendant of Seatrain Shipbuilding Corp., taken on April 30, 1981 (at p. 144):

> "Q. Where is the guardian valve located on the ship?
>
> A. The [a]stern guardian?
>
> Q. Yes.
>
> A. Between the high pressure and low pressure turbine."

5. Installation of the astern guardian valve in reverse is not dangerous. As Patrick O'Shea testified at his deposition (at pp. 148-149):

> "Q. Do you think it might be pretty dangerous if the [astern guardian] valve were installed backwards?

A. Dangerous?

Q. Yes.

A. No, I wouldn't say it[']s dangerous."

6. Damage to the Bay Ridge resulted from the gradual deterioration of its low pressure turbine, during a voyage which commenced on February 22, 1980 in New York. See plaintiffs' expert report, "Investigation of Astern Turbine Failure on the T.T. Bay Ridge", dated March 4, 1981, prepared by Encotech, Inc. (the Encotech Report"), p. 7-4.* (Copies of the cover page and pp. 1-1, 7-4 and 7-5 of the Encotech Report are annexed as Exhibit A).

7. First, according to the Encotech Report, the low pressure turbine blades of the Bay Ridge developed oxidation. Encotech Report, p. 7-5. Next, about March 6, 1980, just before the ship arrived at Rio de Janeiro, Brazil, heating and stretching of the last row blading of the turbine took place, and there was rubbing between the turbine casing and blading. *Id.* Parts of the last row blading came off within the turbine and lodged in the intermediate blade ring of the turbine. *Id.*

8. After the Bay Ridge left Rio de Janeiro in March 1980, the Encotech Report notes that more heating, stretching and rubbing of parts took place; and additional material broke off inside the low pressure turbine. *Id.* The Bay Ridge, however, continued on its course from Rio

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* A copy of this report was submitted to defendant by plaintiffs in partial response to defendant's interrogatories to plaintiffs and sets forth Richmond's version of how the low pressure turbine damage occurred.

de Janeiro around Cape Horn, until it experienced vibration which it perceived to be unacceptable. *Id.* It then slowed and proceeded to Talcuhuano, Chile for repairs. Complaint ¶6, p. 10. The repairs were made beginning on or about March 18, 1980, and the ship resumed its course on March 22, 1980 for Valdez, Alaska. Complaint ¶6, p. 10.

9. The astern guardian valve of the Bay Ridge was installed by Seatrain Shipbuilding Corp., not Delaval. As former Vice-President of Engineering of Seatrain Shipbuilding Corp., Harlen Thomas Haller, testified at his deposition in the matter (at pp. 28-29) taken on April 16, 1981:

"Q. Your reference to the installation of a guardian valve backwards. . . .

• • •

Q. Who installed that valve for the BAY RIDGE?

A. Seatrain Shipbuilding.

Q. Who at Seatrain Shipbuilding was in charge of the installation?

A. Patrick O'Shea."

Mr. O'Shea confirmed that (at p. 145 of his above deposition) that Seatrain Shipbuilding Corp. installed the guardian valve on the Bay Ridge:

"Q. Who installed the guardian valve on the BAY RIDGE?

A. The machinists, I gather, my machinists."

10. Astern guardian valves were installed properly on the Stuyvesant, the Williamsburgh, and the Brooklyn, which were built before the Bay Ridge. As Harry Decker,

former turbine consultant to Seatrain Shipbuilding Corp., testified at his deposition taken on June 3, 1981:

> "Q. Were the guardian valves installed properly on properly on the other three ships, the STUYVESANT, WILLIAMSBURG[H] and BROOKLYN?
>
> A. Yes. (Decker Deposition, p. 138).
>
> • • •
>
> "They [the Seatrain Shipbuilding shipyard] put three [astern guardian valves] in there before that [valve installed in the Bay Ridge]. They ought to have sense enough to put the fourth one [in the Bay Ridge] in." (Decker Deposition, p. 139).

11. Litigation of the Fifth Count is likely to be extensive in view of the size of Richmond's claim. Plaintiffs' answers to Delaval's interrogatories show that Richmond seeks to recover in excess of $3 million in damages on the Fifth Count. (Copies of the pertinent answers to defendant's interrogatories are annexed as Exhibit B). Delaval has served interrogatories and requests for production with respect to the Fifth Count to which there has been no response. In addition, there will be third-party claims against those alleged to be responsible for the alleged improper installation of the astern guardian valve, since Delaval did not install the valve. See ¶ 9 *supra*.

12. On the basis of the foregoing facts and Delaval's accompanying memorandum of law, Delaval respectfully submits that this motion for reargument should be granted and that the Fifth Count of the Second Amended Complaint should be dismissed. Alternatively, Delaval requests that this Court certify the order to be entered pursuant to its opinion to the United States Court of Appeals for the Third Circuit.*

/s/ Robert E. Smith

Sworn to before me this
17th day of November, 1982

/s/ Norman L. Greene
Notary Public

EXHIBIT A

ENCOTECH, INC.

TR 116

INVESTIGATION OF ASTERN TURBINE FAILURE ON THE T.T. BAY RIDGE

PREPARED FOR:

Mr. Charles R. Nealis
Consultant to Bay Tankers
70 Pine Street
37th Floor
New York, NY 10005

March 4, 1981

Approved by:
/s/ Fred H. Kindl, President

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* A proposed order and judgment to be certified has previously been submitted to the Court to be entered. (A copy is annexed as Exhibit C). However, if the motion for reargument is granted, no order need be submitted, since the entire case will be resolved in Delaval's favor and a final judgment will be entered. Delaval will submit such a judgment upon request of the Court.

INTRODUCTION

On March 13, 1980, the T.T. Bay Ridge was approximately 150 miles beyond Cape Horn on a voyage from New York Harbor to Valdez, Alaska. This was the maiden voyage, and the ship was in ballast and on its way to pick up a load of crude oil at Valdez.

An increase in vibration level on the steam turbine was identified by one of the crew members and confirmed by Mike Bullard, the chief engineer. The vibrations seemed to build up fairly quickly and continued to increase even after reducing engine speed. The ship had been cruising at a relatively constant speed (approximately 93 RPM) since leaving Rio de Janiero, which was the last port of call.

The low pressure turbine was taken out of service, and the ship put into the port of Talchahuano, which is on Concepcion Bay, Chile for repairs.

After opening the low pressure turbine, it was identified that the last row of the astern turbine blading was severely damaged, and in several instances portions of the blading were missing.

• • •

D. *Turbine Operating Speed*

The ship left New York and sailed to Norfolk on February 22, 1980 where it stopped briefly before leaving for Rio de Janiero on February 23rd. It arrived in Rio early on the morning of March 7th and after a short stay left for Long Beach, CA late that night.

A review of the ships log revealed that average propellor speed during a watch was generally under 94 RPM with only a few exceptions. There were four or five "watches" during the trip when speed was between 94 and 95 RPM,

but more importantly, there was one watch between Norfolk and Rio where average speed was 95.9 RPM and one just preceeding the failure on March 13th at Cape Horn when it was 95.2 RPM. It is significant also that this is an average speed during the 4 hour watch and that during the last 25 minutes of the period of high speed operation on March 13th the propellor speed was reduced somewhat below average by action of a runback device sensitive to high water level in the boiler. This means peak speed during the majority of the watch exceeded the 95.2 level by some unknown amount.

The turbine is direct coupled through reduction gearing to the propellor shaft so that propellor speed is a direct indication of turbine speed. The significance of turbine speed in understanding the failure is twofold. The stress in the blade which caused the tensile failure is directly proportional to the square of turbine speed. Also, the heating resulting from steam leakage into the astern turbine is proportional to the speed squared. This means that as the stress trying to break the blade is going up, the strength of the material is coming down because of the increase in temperature.

The impact of temperature on material strength becomes very significant as temperatures in the neighborhood of 1100F are reached or exceeded. For example: at 1080F, type 422 material will rupture in about 1000 hours at a stress of 10000 psi. Raising this temperature to slightly over 1200F will result in failure in one hour at the same stress.

E. *Sequence of Events Leading to the Failure*

The evidence available indicates there were two failures from the same cause. The damage to the last row blades

clearly occurred with the ship operating in the ahead direction, however, it was evident that a significant portion of the damage to the first row second stage blades occurred with the ship going astern. Mike Bullard cannot recall any astern operation after the time when the second stage second row failure was identified through the rise in turbine vibration level. The last time astern operation took place was while entering port in Rio.

The sequence of events appears to be as follows:

1. During most of the trip the turbine speed was about 92-93% of maximum and temperatures in the astern blading were in the 1000 to 1100F range. This resulted in the oxidation observed on the failed blades.

2. On March 6th just before arriving in Rio the speed rose to 95.9% of maximum, heating and stretching of the last row blading occurred, and rubbing between the blading and casing took place. Some parts of the last row came off (probably covers) and became lodged in the intermediate blade ring. While this undoubtedly produced some unbalance, it was not sufficient to be evident as external vibration. The parts lodged in the blade ring produced the damage to the first row during maneuvering operations while entering the harbor at Rio de Janiero.

3. After leaving Rio, operation was satisfactory until once again a high turbine speed (95.2+% of maximum) was reached just after rounding Cape Horn. The earlier sequence ("2" above) was repeated but proceeded until enough material broke off and became caught between the rotating blading and the casing that more severe rubbing occurred. This rubbing added

heat to the blades producing the overheated tip sections and very hot center sections described on page 6-2. Damage was sufficient at this time to result in unacceptable vibration, the ship was slowed to a stop, and the turbine "singled up" for the trip to port for repair.

EXHIBIT B

T.T. BAY RIDGE—L.P. TURBINE DAMAGE

Estimated cost of renewal of damaged parts and repair costs and other related expenses including deviation costs when vessel was diverted to Talchauana, Chili for emergency temporary repairs from March 13, 1980 through March 22, 1980.

Item		Amount
A	Shipyard Bill for L.P. Turbine	
	1) Twenty one (21 days services for L.P. turbine base from T.T. Stuyvesant previous repair at Triple "A" shipyard	135,725*
	2) Plus repairs—base from T.T. Stuyvesant previous repair at Triple "A" shipyard	286,462*
	3) Plus cost involved with reblading	85,000*
	4) Temporary repair cost at Talchauana, Chile per ASMAR attach copy of invoice	52,200
	5) Plus 50% U.S. esutom duty of the above temporary repair at Talchauana, Chile	26,100*
B	DeLaval charges for repair parts	
	1) 1-pc. guide bucket ring	88,343
	2) 1-set stage 2 row # 10 astern blade	92,554
	3) 1-set stage 2 row # 11 astern blade	92,554
	4) 1-pc. 2nd stage astern diaphragm	117,106

Item	Amount
C Turbine Service Representatives	
1) Delaval bladers—fee, overtime & expenses 18 days @ $700.00/day	12,600*
2) Delaval service representatives—fee, overtime & expenses: 21 days @ $700.00/day	14,700*
3) Decker service representative 21 days @ $400.00/day	8,400*
4) Port engineer—fee & expenses 21 days @$400.00/day	8,400*
5) Ur. repose—Delaval field service representative at Concepcion, Chile, worked dates 3/17-26/80 per attach invoice No. 4-2487	10,320
NOTE: Ocean Shipping & Trading Co. refused to pay this invoice since we never request their services for the above turbine damages but did notify them that they had the right to attend	
6) Decker service representative dates worked 3/17-to 3/22 at Talchauana, Chile 6 days @ $400.00/day	2,400*
D Transportation of Parts	
1) Shipment of repair parts by Horizon Air Freight from New York to Talchauana, Chile on March 1980 under P.O. Nos. # 461, # 448, #484	1,553
2) Shipment of repair parts from New York to shipyard	3,000

Item	Amount
E Other Expenses	
1) Pilotage, Tug's charges, launch hire, agency fee, etc . . .	30,000*
2) Gas free vessel for entry into repair area of port	32,000*
3) Encotech—investigation services into astern failure, dates worked April 1 to July 15, 1980 per attach invoice	5,143
4) Western Ocean Services—custom entry fee and other expenses	5,673
5) Deviation into Talchauana, Chile and prolongation expenses from March 13, 1980 through March 22, 1980—(10 days)	
a) Crew—wages & overtime per manning scale @ $3,429.79 per day	34,397.90
taxes @ $292.38 per day	2,923.80
benefits @ $2,178.50 per day	21,785
b) Extra cost of meals for crew & shore personnels 1374 @ $2.50 per meal	3,435
c) Extra meals served steward department per statement	947.25
d) Additional fuel consumed per Chevron inv. 3,337 bbls. @ $18.31 per bbl.	61,100.47
e) Fuel consumed during engine trials 10 bbls. @ $18.81 per bbl.	183.10

Item		Amount
E 5)		
	f) Pilotage, tugs charges, agency fee, etc. per statement or acount	24,224.21
	g) Cables, telephones, postages and other misc. expenses	2,200*
	6) Loss of vessel's availability for (26) twenty-six days at $48,000 per day operational and finance plus $20,000 per day margin	1,768,000*
F	Total Cost of the Above Items	
	A) Total cost of shipyard bill	585,487
	B) Total cost of Delaval charge of repair parts	390,557
	C) Total cost of turbine service representatives	56,820
	D) Total cost of transportation of parts	4,553
	E) Total cost of other expenses	1,992,013
	Grand Total Cost	$3,029,430

* Estimated Cost

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 80-238

Assigned to Hon. Lawrence A. Whipple

EAST RIVER STEAMSHIP CORP.,
a New York Corporation;

KINGSWAY TANKERS, INC.,
a New York Corporation;

QUEENSWAY TANKERS, INC.,
a Delaware Corporation;

RICHMOND TANKERS, INC.,
a Delaware Corporation,

Plaintiffs,

vs.

DELAVAL TURBINE, INC., now known as TRANSAMERICA DELAVAL, INC., a Delaware Corporation,

Defendant

Civil Action
SECOND AMENDED
COMPLAINT

The plaintiffs complain of the defendants and state:

JURISDICTION

1. (a) Jurisdiction is founded upon Rule 9(h) of the F.R.C.P. (Admiralty).

(b) The plaintiffs, East River Steamship Corp., incorporated in the State of New York and who maintains its principal place of business at Fort Lee, New Jersey (hereinafter called "East River"), Kingsway Tankers, Inc., incorporated in the State of New York and who maintains its principal place of business at Fort Lee, New Jersey (hereinafter called "Kingsway"), Queensway Tankers, Inc., incorporated in the state of Delaware and who main-

tains its principal place of business at Fort Lee, New Jersey (hereinafter called "Queensway"), Richmond Tankers, Inc., incorporated in the State of Delaware and who maintains its principal place of business at Fort Lee, New Jersey (hereinafter called "Richmond") are engaged in the business of chartering and operating seagoing vessels.

(c) The defendant, Delaval Turbine, Inc., now known as Transamerica Delaval, Inc., (hereinafter called "Delaval"), is a Delaware corporation, with its principal place of business in the State of New Jersey.

Jurisdiction is founded upon Rule 9(h) of the F.R.C.P. (Admiralty).

ALLEGATIONS COMMON TO ALL CLAIMS AGAINST DELAVAL

2. During 1969, Shipbuilding announced that it was about to schedule the construction of five Two Hundred and Twenty-five Thousand ton super-tankers at its facilities in Brooklyn, New York. Delaval thereafter communicated with Shipbuilding and advised that it, Delaval, was desirous of designing, manufacturing and constructing certain turbine units, which were to be installed in the afore-referred to "supertankers", which said turbine units were to be the power propellants for such ships. In addition thereto, Delaval advised Shipbuilding that it, Delaval, possessed total expertise and ability to properly design, manufacture, construct, and supervise the installation of the involved turbines.

2. (a) Thereafter, and predicated upon the expressed and implied representation theretofore made by Delaval to Shipbuilding, a contract was issued by Shipbuilding to Delaval for the design, manufacture, and construction of

the involved turbines, which said turbines were thereafter installed in the supertankers under direct supervision of Delaval.

HISTORY OF THE T.T. STUYVESANT, T.T. BROOKLYN, T.T. WILLIAMSBURG, AND T.T. BAY RIDGE

3. The T. T. Stuyvesant, a 225,000 deadweight ton tanker, was built by the Shipyard under contract with Polk Tanker Corporation which thereafter on August 15, 1977 transferred title to that tanker to U. S. Trust as trustee for General Electric Credit Corporation which thereupon on August 15, 1977 chartered this said tankers to Queensway under a chartering agreement for a term of twenty years, which said agreement is incorporated herein as if fully set forth.

The construction of the T.T. STUYVESANT was completed proximate to July 1, 1977. It sailed proximate to July 30, 1977 and was delivered to the owner proximate to August 15, 1977. On August 15, 1977, the owner entered into a bareboat charter for a term of twenty years with the plaintiff Queensway who on September 30, 1977, entered into a time charter with Standard Oil of Ohio and on the same date, September 30, 1977, also entered into a management contract for the managing and manning of the STUYVESANT with Cove Shipping Co., Inc.

On December 11, 1977, the T.T. STUYVESANT, while operational and while preparing to make arrangements to enter the Port of Valdez, experienced an unexpected and loud noise which emanated from its engine room. Upon investigation and inspection, it was determined that superheated steam was being emitted from a point where the steam inlet control valve chest is attached to the high pres-

sure turbine casing. The super-heated steam, while escaping, created an extremely dangerous condition, more particularly to the ship's personnel. Interim repairs were made upon arrival at Valdez.

After departing Valdez, with cargo, at appropriate maneuvering speeds, the ship's Master then attempted to increase the ship's speed to normal appropriate sea speed which was made impossible because of the malfunctioning of the ship's turbine.

The T.T. STUYVESANT continued its voyage under these circumstances intending to arrive at an off-loading vessel near Panama. While enroute and when proximate to Long Beach, California, certain technical experts were transferred to the T.T. STUYVESANT so as to review the happenings at Valdez and to conduct an inspection of the involved turbine which was done. The ship continued to Panama, discharged its cargo, and then proceeded, unloaded, to a docking at San Francisco, California. Upon this arrival on January 27, 1978, the involved turbine was "opened up" for a detailed inspection so as to determine the cause of the episode at Valdez and the resultant inability to proceed at proper speeds. Present at this inspection were representatives of the Charterer, Delaval, American Bureau of Shipping and the United States Const Guard, among others.

This inspection determined that the rotor, thrust and internal stationary parts of the H.P. turbines were in a badly damaged condition, so much so that it was not possible to determine with exactness the actual cause of the casualty.

The damaged parts, now hereinabove referred to, including the H.P. first stage steam reversing blade ring,

were removed and were replaced with parts then taken from the T.T. BAY RIDGE, which was then under construction at Seatrain's facility in Brooklyn, New York. Upon completion of the involved work, the T.T. STUYVESANT again became operational and returned to sea.

In March and April, 1978, as a result of the findings made during the inspection of the T.T. STUYVESANT, an inspection was made of the H.P. turbines of the T.T. BROOKLYN and the T.T. WILLIAMBURG. The first stage stationary steam reversing ring was removed from the T.T. BROOKLYN and was transferred to San Francisco. The T.T. STUYVESANT was again caused to be docked at which time the first stage steam reversing blade ring which had been theretofore taken from the T.T. BROOKLYN and as repaired and modified was installed in the T.T. STUYVESANT as interim or temporary repair.

At the time of this installation, April 8 through April 11, 1978, but prior to the actual installation, an inspection was made of the new parts installed in February, 1978, which were the parts taken from the T. T. BAY RIDGE, which ship was still under construction at the time the involved turbine parts were removed, and it was seen and determined that parts of the H.P. first stage steam reversing ring were in fact disintegrating and certain of its parts had passed through the H.P. turbine rotating and stationary parts, this being so even though the involved parts were operational for a period of less than nine weeks.

In August, 1978, again at San Francisco, the T.T. STUYVESANT, while docked, again underwent repairs at which time the temporary replacement parts installed in April, 1978 were removed and in their stead there was in-

stalled a newly designed, constructed and manufactured H.P. first stage steam reversing ring supplied by Delaval, and in addition thereto a "new" L.P. first stage steam reversing ring was also installed which installation was required because of the fact that the original design of the L.P. ring was defective, subsequent to which the T.T. STUYVESANT returned to operation.

4. The T.T. WILLIAMSBURG, a 225,000 deadweight ton tanker, was built by the shipyard under contract with Tyler Tanker Corporation which thereafter on November 30, 1974 transferred title to that tanker to Wilmington Trust Co., as trustee for General Electric Credit Corporation, which thereafter chartered this said tanker to Kingsway under a chartering agreement which commenced on January 1, 1975 and was for a period of twenty years, which said agreement is incorporated herein as if fully set forth.

The construction of the T.T. WILLIAMSBURG was completed proximate to December 31, 1974 and thereafter delivered to its owner.

In March, 1978 and at those times when the inspection and repairs were being made to the T.T. STUYVESANT, and because of dangerous conditions experienced on the T.T. STUYVESANT, it was determined in the interest of safety and caution that inspection should be made of the H.P. turbine of the T.T. WILLIAMSBURG which was done upon the ship's docking at Europort, Rotterdam, The Netherlands.

The inspection and examination determined that the first stage steam reversing blade ring was in the process of falling apart and that disintegrating parts of this ring

had passed through the H.P. turbine's rotating and stationary parts. The damage as seen to the turbine on the T.T. WILLIAMSBURG was to a varying degree the same type of damage as was viewed on the involved turbine on the T.T. STUYVESANT. The defective first stage steam reversing blade ring was removed and was repaired and strengthened between March 28 and April 5, 1978 at the Verolme Shipyard at Rotterdam at the direction of Delaval and under the supervision of Delaval's representatives. This repaired and strengthened ring, as an interim fix, was then reinstalled in the T.T. WILLIAMSBURG.

Between July 23, 1978 and September 25, 1978, while at anchorage at Elevsis, Greece there was again removed from the T.T. WILLIAMSBURG the ring which was originally installed in the T.T. WILLIAMSBURG and which was repaired in April, 1978 at Rotterdam and in its stead there was installed a newly designed, constructed, and manufactured H.P. first stage steam reversing ring supplied by Delaval and in addition thereto, certain other, but not all, then required repairs were made to the H.P. and L.P. turbines, subsequent to which the T.T. WILLIAMSBURG returned to operation.

Between December 8, 1978 through January 24, 1980, the T.T. WILLIAMSBURG was required to again be docked, this time at Sakaide, Japan, during which period of time, those repairs then still remaining outstanding and which repairs were not accomplished during the docking at Rotterdam between March 28 and April 5, 1978, and during the docking at Elevsis, Greece between July 23, 1978 and September 25, 1978 were in fact accomplished, subsequent to which the T.T. WILLIAMSBURG returned to operation.

5. The T.T. BROOKLYN, a 225,000 deadweight ton tanker, was built by the Shipyard under contract with Langfitt Shipping Corporation which thereafter on December 1, 1973 transferred title to that tanker to Wilmington Trust Co., as trustee for General Electric Credit Corporation, which thereupon chartered this said tanker to East River Steamship Corp. under a chartering agreement dated December 1, 1973 for a term of twenty years, which said agreement is incorporated herein as if fully set forth.

The construction of the T.T. BROOKLYN was completed proximate to December 31, 1973 and thereafter delivered to its owner.

In March, 1978, and at those times when the inspection and repairs were being made to the T.T. STUYVESANT, and because of dangerous conditions experienced on the T.T. STUYVESANT, it was determined in the interest of safety and caution that inspection should be made of the H.P. turbine of the T.T. BROOKLYN, which was done while the vessel was at anchorage at Elevsis, Greece. This inspection and examination determined that the H.P. first stage steam reversing blade ring was in the process of falling apart and that disintegrating parts of this ring had passed through the H.P. turbine's rotating and stationary parts. The damage as seem to the turbine on the T.T. BROOKLYN was to a varying degree the same type of damage as was viewed on the involved turbine on the T.T. STUYVESANT. The defective H.P. first stage steam reversing blade ring was removed, shipped to and was repaired and strengthened at the Triple A Shipyard at Hunters Point, San Francisco, California, under the recommendation and direction of and under the supervision of Delaval. This repaired and strengthened ring, an interim fix,

was then installed in the T.T. STUYVESANT between April 8 and April 11, 1978. The defective first stage steam reversing ring removed from the T.T. STUYVESANT in April of 1978 was then shipped to Delaval, Trenton, New Jersey for strengthening and repairs and upon completion, was sent to and installed in the T.T. BROOKLYN at Elevsis, Greece in early June, 1978 as an interim fix.

In August of 1978, a newly designed, constructed and manufactured H.P. first stage steam reversing ring was supplied by Delaval and shipped to and installed in the T.T. BROOKLYN in August of 1978, subsequent to which the T.T. BROOKLYN returned to sea.

In addition to the repairs made to the H.P. turbine, repairs and replacement parts were required in the L.P. turbine, which repairs and replacement parts were in fact made to and installed in the L.P. turbine.

6. The T.T. BAY RIDGE, a 225,000 deadweight ton tanker, was built by Shipbuilding for and under contract with Fillmore Tanker Corporation which thereafter on March 15, 1979 transferred title to such tanker to U. S. Trust Company as trustee for Security Pacific Bank and American Road Equipment Corporation which thereupon on March 15, 1979 chartered this said tanker to Richmond Tankers, Inc. for a term of twenty-two years, which said charter agreement is incorporated herein as if fully set forth.

The T.T. BAY RIDGE while under bareboat charter to Richmond Tankers, Inc. and after departing New York in ballast for Valdez, Alaska and while so enroute and on March 13, 1980, experienced a sustained damage to its low pressure turbine.

The T.T. BAY RIDGE was then required to stop and not proceed which action was necessitated and caused because of the experienced damage to its low pressure turbine. A review or inspection of the damage was then undertaken, subsequent to which certain limited repairs were made. The T.T. BAY RIDGE then resumed course, at materially reduced speeds but was required to deviate from its intended course and to enter a port of refuge, Talcahuano, Chile for additional repairs.

On March 18, 1980, the T.T. BAY RIDGE arrived at the Port of Talcahuano, Chile where certain additional repairs were made. All repairs which were required and which were occasioned by the afore-referred to casualty and damages could not and were not completed during this stay. After those repairs which could have been made were in fact made, the T.T. BAY RIDGE resumed its course for Valdez, Alaska on March 22, 1980.

7. At all times revelant hereto, Delaval held itself out to be a leader in the turbine manufacturing industry and as having expertise in design, manufacture, construction and installation of turbines essential to the proper operation of the aforesaid supertankers. Delaval did in fact thereafter design, manufacture, construct and supervise the installation of the involved turbines as actually installed in the afore-referred to supertankers.

At all times material hereto, more particularly but not limited to those times Delaval claimed that it, Delaval possessed the experience, skill and expertise necessary to design, manufacture, construct and properly install the involved turbines, it, Delaval, knew, or in the exercise of reasonable care should have known, that:

(a) the supertankers for which the turbines were being designed, constructed, manufactured and installed were intended to transport large quantities of liquids and other commodities, including oil;

(b) the uninterrupted commercial operation of the ships by the plaintiffs would be dependent upon the safe, reliable and overall satisfactory operation of said turbine units, that being the intended use of such turbines;

(c) any inadequate, defective, or otherwise unsatisfactory design, manufacture or installation of any of the involved turbines could or would cause serious injury to persons and/or property and would result in additional damages being sustained by these plaintiffs;

(d) the reliability and durability of the turbines were of utmost importance inasmuch as these turbines were the sole source of power required to propel and power the involved supertankers;

(e) any adequate, defective or otherwise unsatisfactory equipment supplied or installed by Delaval would have to be repaired, replaced or modified, causing delay and additional expense, as well as disruption of the involved tankers operations.

(f) to repair or modify the defective turbines or to repair or modify the turbines damaged by a defective installation would take the ships out of service for considerable periods of time;

(g) The use of such ships, each of them and all of them, by the owner or charterer would be materially dependent upon the safe, reliable and overall satisfactory operation of said turbine units, as was intended.

FIRST COUNT

The plaintiff, Queensway Tankers, Inc. by way of complaint, says:

8. (a) It incorporates the allegations of paragraphs 1(b), 1(c), 2, 3, and 7 by references and incorporates them as if fully set forth herein.

(b) The defendant did by its actions hereinbefore set forth, undertake, and in fact did supply a product, which said product was a fully installed main propulsion unit e.g., the high pressure and low pressure turbine together with certain appurtenances including but not limited to a certain guardian valve, which said product when properly installed would power the T.T. STUYVESANT, the intended use of such product.

(c) It thereby became and was the duty of the defendant to properly design, manufacture, (including the use of proper materials and workmanship) construct and install the involved turbines, both H.P. and L.P. so as for such product to be reasonably fit, suitable and safe for its intended purposes, e.g. the powering of the T.T. STUYVESANT, and to so as to avoid the use of an improper design for such product, and to avoid the use of improper materials or workmanship and to avoid the improper installation of such product in the T.T. STUYVESANT.

(d) Notwithstanding and disregarding its duty as aforesaid, the defendant carelessly, improperly and negligently designed, manufactured and constructed the involved product, including the use of defective or improper materials and faulty workmanship, so that as the direct and proximate result of the actions of this defendant, the product as was in fact installed in the T.T. STUYVESANT was not reasonably fit, suitable nor safe for use as its intended use, but to the contrary, the product as installed by this defendant in the T.T. STUYVESANT was unfit, unsuitable and unsafe.

(e) As the direct and proximate result of the defendant's failure to properly design, manufacture and construct the involved product, the product as supplied by this defendant was not reasonable fit nor suitable nor safe for use as was intended and the T.T. STUYVESANT was prevented from operating as ordinarily it would so have operated and the plaintiff, Queensway Tankers, Inc. was caused to sustain money damages as the result of the T.T. STUYVESANT being unoperable and was also required to expend monies in the necessary and proper repair of the product as supplied so as to render the said product reasonably fit for its intended purpose, all of which is to its damage.

WHEREFORE, plaintiff, Queensway Tankers, Inc. demands judgment on this Count against the defendant together with interest and cost of suit.

SECOND COUNT

The plaintiff, Kingsway Tankers, Inc., by way of complaint, says:

9. (a) It incorporates the allegations of paragraphs 1(b), 1(c), 2, 3, and 7 by reference and incorporates them as if fully set forth herein.

(b) The allegations of paragraph 8.(b) are incorporated herein as if fully set forth.

(c) The allegations of paragraph 8.(c) are incorporated herein as if fully set forth.

(d) The allegations of paragraph 8.(d) are incorporated herein as if fully set forth.

(e) The allegations of paragraph 8.(e) are incorporated herein as if fully set forth.

WHEREFORE, plaintiff, Kingsway Tankers, Inc. demands judgment on this Count against the defendant together with interest and cost of suit.

THIRD COUNT

The plaintiff, East River Steamship Corp., by way of complaint, says:

10. (a) It incorporates the allegations of paragraphs 1(b), 1(c), 2, 3, and 7 by reference and incorporates them as if fully set forth herein.

(b) The allegations of paragraph 8.(b) are incorporated herein as if fully set forth.

(c) The allegations of paragraph 8.(c) are incorporated herein as if fully set forth.

(d) The allegations of paragraph 8.(d) are incorporated herein as if fully set forth.

(e) The allegations of paragraph 8.(e) are incorporated herein as if fully set forth.

WHEREFORE, plaintiff, East River Steamship Corp. demands judgment on this Count against the defendant together with interest and cost of suit.

FOURTH COUNT

The plaintiff, Richmond Tankers, Inc., by way of complaint, says:

11. (a) It incorporates the allegations of paragraphs 1(b), 1(c), 2, 3, and 7 by reference and incoporates them as if fully set forth herein.

(b) The allegations of paragraph 8.(b) are incorporated herein as if fully set forth.

(c) The allegations of paragraph 8.(c) are incorporated herein as if fully set forth.

(d) The allegations of paragraph 8.(d) are incorporated herein as if fully set forth.

(e) The allegations of paragraph 8.(e) are incorporated herein as if fully set forth.

WHEREFORE, plaintiff, Richmond Tankers, Inc., demands judgment on this Count against the defendant togther with interest and cost of suit.

FIFTH COUNT

The plaintiff, Richmond Tankers, Inc., by way of complaint, says:

12. (a) It incorporates the allegations of paragraphs 1(b), 1(c), 2, 3, and 7 by reference and incorporates them as if fully set forth herein.

(b) While and during those times that the T.T. BAY RIDGE was under construction and more particularly, but not limited to those times when the main propulsion unit was being installed, which said main propulsion unit was theretofore designed, manufactured and constructed by this defendant, this defendant had, included within its duties, the duty, responsibility and obligation to supervise the installation of such main propulsion unit

together with certain appurtenances including the involved astern guardian valve. The involved astern guardian valve, the supervision of the installation of which, as hereinabove stated, was the duty, obligation and responsibility of this defendant and this defendant knew that when and if in the event the installation of the involved astern guardian valve was not performed in a proper and workmanlike manner, then in that event, certain steam which was not intended to enter into and upon the L.P. astern turbine would in fact enter the astern L.P. turbine and would cause extensive damage to the said turbine and would render the T.T. BAY RIDGE inoperable.

(c) Notwithstanding and disregarding its duty as aforesaid, the defendant carelessly, improperly, and negligently performed its said duty in supervising the installation of the afore-referred to astern guardian valve so that as the direct and proximate result of its careless, improper and negligent supervision, the afore-referred to astern guardian valve was installed in reverse.

(d) As a direct and proximate result of the negligence of the defendant in permitting the improper installation of the afore-referred to astern guardian valve, the said guardian valve was installed in reverse and as the direct and proximate result of the improper installation of the involved astern guardian valve, steam not intended to enter the said turbine did in fact enter the turbine thereby causing extensive and substantial damage to the involved turbine and did for a period of time render the T.T. BAY RIDGE inoperable.

(e) As the direct and proximate result of the defendant's negligent supervision of the installation of the involved astern guardian valve, the plaintiff Richmond

Tankers, Inc. was required to expend monies in the necessary and proper repair of the damage as sustained by the turbines as aforesaid, and will in the future be required to expend additional and substantial sums of monies in the additional repairs of the damage to the said turbine and in addition thereto, this plaintiff has been denied and will in the future be denied the use of this said vessel and will because of the deprivation of the use of the said vessel, sustain the loss of substantial income ordinarily to be expected from the use and operation of this said vessel, all of which is to its damage.

WHEREFORE, plaintiff, Richmond Tankers, Inc. demands judgment on this Count against the defendant together with interest and cost of suit.

/s/Thomas E. Durkin, Jr.
Attorney for Plaintiffs
50 Park Place
Newark, New Jersey 07102

Dated:

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-238

(Hon. Lawrence A. Whipple)

SEATRAIN LINES, INC., a Delaware Corporation; SEATRAIN SHIPBUILDING CORP., a Delaware Corporation; EAST RIVER STEAMSHIP CORP., a Delaware Corporation; KINGSWAY TANKERS, INC., a Delaware Corporation; QUEENSWAY TANKERS, INC., a Delaware Corporaton; RICHMOND TANKERS, INC., a Delaware Corporation; LANGFIT SHIPPING CORPORATION, A New York Corporation; TYLER TANKER CORPORATION, a Delaware Corporation; POLK TANKER CORPORATION, a Delaware Corporation; FILLMORE TANKER CORPOATION, a Delaware Corporation,

Plaintiffs,

-against-

DELAVAL TURBINE, INC., now known as TRANSAMERICA DELAVAL, INC., a Delaware Corporation,

Defendant,

STATEMENT PURSUANT TO RULE 12(F) OF THE GENERAL RULES OF THIS COURT

(Filed May 19, 1981)

Pursuant to Rule 12(F) of the General Rules of this Court, defendant Delaval Turbine, Inc., now known as Transamerica Delaval, Inc. ("Delaval"), sets forth the following material facts as to which there are no genuine issues to be tried:

1. Plaintiff Seatrain Lines, Inc. ("Seatrain") is a Delaware corporation with its principal place of business in New York.

2. Plaintiffs Seatrain Shipbuilding, Inc. ("Shipbuilding"), Polk Tanker Corporation, Tyler Tanker Corporation, Langfitt Shipping Corporation and Fillmore Tanker Corporation are wholly-owned subsidiaries of Seatrain with their principal places of business in New York.

3. Plaintiffs Kingsway Tankers, Inc., Queensway Tankers, Inc., East River Steamship Corp. and Richmond Tankers, Inc. are subsidiaries of Seatrain.

4. Delaval is a Delaware corporation with its principal place of business in New Jersey.

5. At all times relevant to this action, Seatrain (and its subsidiaries) was a substantial commercial corporation.

6. Following discussions at Seatrain's offices in New York, plaintiffs entered into an agreement with Delaval for the sale of turbines for four supertankers to be constructed by Shipbuilding: T.T. BROOKLYN (the "Brooklyn"), T.T. WILLIAMSBURGH (the "Williamsburgh"), T.T. STUYVESANT (the "Stuyvesant") and T.T. BAY RIDGE (the "Bay Ridge").

7. The agreement contained a provision, the complete text of which is set forth in the moving affidavit of Robert E. Smith, sworn to on May 17, 1981 at ¶ 7, which disclaimed warranties, limited Delaval's liability and limited plaintiffs' remedies.

8. Delaval manufactured turbines which were sold and delivered to Shipbuilding to be installed in the Stuyvesant, Williamsburgh, Bay Ridge and Brooklyn.

9. The turbines for the Brooklyn, Williamsburgh and Stuyvesant were delivered to Shipbuilding more than five years before the filing of the Complaint.

10. Plaintiffs do not claim damage for any physical injuries or for any physical damage to the four supertankers except to the turbines themselves.

11. Plaintiffs' alleged damages consist of charges for parts, labor, service representatives, consultants, shipyard services, transportation of parts, loss of time, customs charges and other miscellaneous itms. all sustained or incurred in order to repair the turbines or because of the turbines' failure to function as expected by plaintiffs.

12. The Complaint was filed on January 28, 1980.

13. The Answer was served and filed on June 24, 1980.

There is no genuine issue of material fact, and Delaval is entitled to summary judgment as a matter of law.

Dated: May 18, 1981

Respectfully submitted,
KASEN AND KRAEMER
A Professional Corporation
By /s/ Waldron Kraemer
1180 Raymond Boulevard
Newark, New Jersey 07102
(201) 624-5701

GUGGENHEIMER &
UNTERMEYER
80 Pine Street
New York, New York 10005
(212) 344-2040

Attorneys for Defendant
Delaval Turbine, Inc., now known as
Transamerica Delaval, Inc.

UNITED STATE DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-238

(Hon. Lawrence A. Whipple.)

SEATRAIN LINES, INC., a Delaware Corporation; SEATRAIN SHIPBUILDNG CORP., a Delaware Corporation; EAST RIVER STEAMSHIP CORP., a Delaware Corporation; KINGSWAY TANKERS, INC., a Delaware Corporation; QUEENSWAY TANKERS, INC., a Delaware Corporation; RICHMOND TANKERS, INC., a Delaware Corporation; LANGFITT SHIPPING CORPORATION, a New York Corporation; TYLER TANKER CORPORATION, a Delaware Corporation; POLK TANKER CORPORATION, a Delaware Corporation; FILLMORE TANKER CORPORATION, a Delaware Corporation,

Plaintiffs

-against-

DELAVAL TURBINE, INC., now known as TRANSAMERICA DELAVAL, INC., a Delaware Corporation,

Defendant

PLAINTIFFS' RESPONSE TO STATEMENT PURSUANT TO RULE 12 (F) OF THE GENERAL RULES OF THIS COURT

The plaintiffs, each of them and all of them, respond as hereinafter set forth:

1. The plaintiffs admit the allegations of this paragraph.

2. The plaintiffs admit the allegations of this paragraph.

3. The plaintiffs deny the allegations of this paragraph.

4. The plaintiffs admit the allegations of this paragraph.

5. The statement which purports to be a fact is too ambiguous to attempt a response.

6. The plaintiffs admit the allegations of this paragraph.

7. The plaintiffs deny the allegations of this paragraph. The defendant has taken the deposition of Mr. Haller who it was that negotiated on behalf of the purchaser for the acquiring of the involved turbines and he has stated on pages 45 to 50 of his deposition that no such agreement was ever reached relative to the claimed limitations.

8. The plaintiffs admit the allegations of this paragraph.

9. The plaintiffs admit the allegations of this paragraph.

10. The plaintiffs admit the allegations of this paragraph.

11. The plaintiffs admit the allegations of this paragraph.

12. The plaintiffs admit the allegations of this paragraph.

13. The plaintiffs admit the allegations of this paragraph.

Respectfully submitted,

THOMAS E. DURKIN, JR.
Attorney for Plaintiffs
50 Park Place
Newark, New Jersey 07102
(201) 623-8368

Dated: June 1, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-238

Assigned to Hon. H. Curtis Meanor

SEATRAIN LINES, INC., a Delaware corporation, et al.,

Plaintiffs,

-against-

DELAVAL TURBINE INC., now known as TRANSAMERICA DELAVAL INC., a Delaware corporation,

Defendant.

ORDER

(Filed November 5, 1981)

Plaintiffs having moved on or about July 9, 1981 for leave to file a second amended complaint; and the motion having been presented to this Court on October 19, 1981, at the hearing of defendant's motion for summary judgment, by the Law Offices of Thomas E. Durkin, Jr. (by Thomas E. Durkin, Jr. and James T. Owens, Esqs.), attorneys for plaintiffs, in the presence of Kasen & Kraemer and Guggenheimer & Untermyer (by Waldron Kraemer, Robert E. Smith, and Norman L. Greene, Esqs.), attorneys for defendant; and the Court having heard plaintiffs in support of the amendment; and there having been no opposition to the amendment by defendant upon condition, *inter alia*, that the claims being withdrawn by the amendment be dismissed with prejudice and that sufficient time for discovery be afforded as to matters not previously pleaded, and good cause appearing, it is

ORDERED, that plaintiffs' motion for leave to file a second amended complaint in the form submitted with plaintiffs' notice of motion dated July 9, 1981, is granted; and it is further

ORDERED, that the caption of this action is amended to read as follows:

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

East River Steamship Corp., a New York Corporation; Kingsway Tankers, Inc., a New York Corporation; Queensway Tankers, Inc., a Delaware Corporation; Richmond Tankers, Inc., a Delaware Corporation,

Plaintiffs,

vs.

Delaval Turbine, Inc., now known as Transamerica Delaval Inc., a Delaware Corporation,

Defendant.

and it is further

ORDERED, that the claims which are or were made in this action against defendant by Seatrain Lines, Inc., Seatrain Lines, Inc., Seatrain Shipbuilding Corp., Langfitt Shipping Corporation, Tyler Tanker Corporation, Polk Tanker Corporation and Fillmore Tanker Corporation are dismissed with prejudice and without costs; and it is further

ORDERED, that Seatrain Lines, Inc., Seatrain Shipbuilding Corp., Langfitt Shipbuilding Corporation, Tyler Tanker Corporation, Polk Tanker Corporation, and Fillmore Tanker Corporation are dismissed as parties to this action, without costs; and it is further

ORDERED, that all claims which are or were made in this action against defendant by East River Steamship

Corp., Kingsway Tankers Inc., Queensway Tankers Inc., and Richmond Tankers Inc. for breach of contract and breach of express and implied warranty are dismissed with prejudice and without costs; and it is further

ORDERED, that all claims which are or were made in this action by East River Steamship Corp., Kingsway Tankers Inc. and Queensway Tankers Inc. against defendant for negligence are dismissed with prejudice and without costs; and it is further

ORDERED, that defendant's pending motion for summary judgment be deemed made against the Second Amended Complaint; and it is further

ORDERED, that defendant's time in which to answer or otherwise move with respect to the Second Amended Complaint is extended until 20 days after plaintiffs serve defendant with a copy of the Second Amended Complaint with notice of filing or 20 days after defendant receives a copy of an order determining its motion for summary judgment, whichever is later.

Dated: November 4, 1981

/s/ Meanor
U. S. D. J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

* * *

Docket No. 83-5192

Date		Filings — Proceedings
1983		
Mar.	21	Motion by appee., Delaval Turbine, Inc., to dismiss Seatrain Lines, Inc., Seatrain Shipbuilding Corp., Langfitt Shipping Corp., Tyler Tanker Corp. Yolk Tanker Corp. & Fillmore Tankers Corp. as parties to this appeal, for reason they were dismissed as parties to the case by the D. C. before judgmt. & are not parties to the judgmt. of the D.C., w/Memo. of law in sup., w/svc., filed.
Apr.	1	Submitted on above mot. Coram: (Higginbotham and Becker, CJ and Stapleton, DJ).
April	26	Order (*Higginbotham*, Becker, C.J. & Stapleton, D.J.) granting above mot, filed.
April	26	CC of above ord to C of D.C.
May	31	Mot by aplts to file supplemental appendix and X time to file aplees' brief to 30 days after supplemental appendix by aplts is filed, filed.
June	10	Order (Acting Clerk) denying above mot as presented, granting aplee leave to file its own appendix with brief, no duplication of documents shall be included, granting aplee an X of 14 days to file B&A, filed.
July	5	Letter dated 7/5/83 from Robert E. Smith, Esq., counsel for Transamerica Delaval Inc., requesting that Delaval be afforded 30 minutes for oral arg. of this appeal, rec'd Send to merits panel.
July	11	Letter dated 7/7/83 from Clarkson S. Fisher, Jr., Esq., together w/firm of Thomas E. Durkin,

		Jr., counsel for East River Steamship Corp., et al., requesting that aplts be afforded 30 minutes for oral argument, rec'd. Send to merits panel.
Oct.	20	Clk's letter to cnsl written at dir of Ct. requesting that they submit supplemental briefs not to exceed 18 pages on 7 listed questions, etc., original & 9 copies of briefs.
Nov.	17	Court directed counsel to have transcript of oral argmt. prepared at oral argmt.
1984		
Jan.	9	Ltr dtd 1/5/84 from Clarkson S. Fisher, Jr., Esq., cnsel for applts, w/enc recd for the Crt's info.
Jan.	16	Letter dated 1-10-84 from Robert E. Smith, Esq., cnsl for aplee. Transamerica Delaval Inc., rec'd. for Ct's information.
Jan.	23	Letter dated 1-18-84 from Clarkson S. Fisher, Jr., Esq., cnsl for aplts, requesting that either aplee's response to aplts' Rule 28(j) submission be stricken or that the law firm of Evans, Koelzer, Osborne & Kreizman, on behalf of aplts, be permitted to submit legal argument concerning the recent Prudential Lines case, rec'd.
Jan.	26	Copy of transcript of tape of oral argument on 11/17/83, prepared at the Crt's direction.
Jan.	27	Letter dated 1-24-84 from Robert E. Smith, Esq., cnsl for aplee, Trans. Delaval Inc., in response to letter dated 1-18-84 from Clarkson S. Fisher, Jr., Esq., cnsl for aplts, in which it requests that aplts' request to submit legal argument or to strike Delaval's response should be denied, rec'd.
Jun	8	Order (*Seitz*, ChJ, Aldisert, Gibbons, Hunter, Weis, Garth, Higginbotham and Becker) directing that the Clerk of this Court list the case for

rehearing before the court in banc at the convenience of the Court, filed.

July 10 8 Additional ccs of transcript of 3rd Circuit oral argument rec'd. from aplee, rec'd.

July 13 Ltr dtd 7/11/84 from Clarkson S. Fisher, Jr., Esq., cnsel for applts, pur. to Rule 28(j), F.R. A.P., w/encl., recd for the Crt's info.

July 18 Letter dated 7-13-84 from Robert E. Smith, Esq., cnsl for aplee, Transamerica Delaval Inc., in response to 7-11-84 letter from Clarkson S. Fisher, Jr., Esq., cnsl for aplts, rec'd.

Aug. 17 Letter dated 8-14-84 from Clarkson S. Fisher, Jr., Esq., cnsl for aplts, purs to Rule 28(j), F.R. A.P., w/enc, rec'd. for Ct's info.

Aug. 20 Letter dated 8-17-84 from Robert E. Smith, Esq., cnsl for aplee, in response to Mr. Fisher's letter of 8-14-84 rec'd. for Ct's info.

Oct. 10 Clerk's letter to cnsl written at dir of Ct. requesting that cnsl be prepared at oral argument on question of scope of a manufacturer's liability in admiralty cases for economic loss resulting from a product defect, etc.

1985

Jan. 28 Order Amending Slip Opinion (Aldisert, Ch.J., Seitz, Gibbons, *Hunter*, Weis, Garth, Higginbotham & Becker, CJS) filed. (ch)

Jan. 31 Ltr. dtd. Jan. 30, 1985 rec'd fr. Clarkson S. Fisher, Jr., Esq., cnsl for Appellants rec'd. 11 cc's. (ch)

Mar. 4 Receipt of the Certified list acknowledged by C of DC, Filed. (ch)

Oct. 28 Ltr dtd October 23, 1985 received from the Clerk of the Supreme Court requesting that the record be certified and transmitted. (ch)

Oct. 31 Certification of appendices and partial proceedings filed in this Court forwarded to the Clerk of the Supreme Court. (ch)

PETITIONER'S

BRIEF

No. 84-1726

In The

Supreme Court of the United States

October Term, 1985

EAST RIVER STEAMSHIP CORP., KINGSWAY TANKERS, INC., QUEENSWAY TANKERS, INC., and RICHMOND TANKERS, INC.,
Petitioners,

vs.

TRANSAMERICA DELAVAL, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONERS

Clarkson S. Fisher, Jr.*
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Counsel for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. May repair costs and the costs incurred due to the loss of the use of a vessel, proximately caused by a defective product, be recovered, absent proof of "an unreasonable risk of harm,"

(a) in an admiralty strict liability in tort action? and

(b) in an admiralty negligence action?

2. Does not the rule adopted by the court below, in clear contradiction of the decisions of this Court, and other courts of appeals, encourage negligent and reckless conduct on the part of manufacturers and designers of vessels and vessel components?

PARTIES BELOW

Petitioners East River Steamship Corp. ("East River"), a New York corporation, Kingsway Tankers, Inc. ("Kingsway"), a New York corporation, Queensway Tankers, Inc. ("Queensway"), a Delaware corporation, and Richmond Tankers, Inc. ("Richmond"), a Delaware corporation, are the bareboat charterers of the T.T. BROOKLYN, T.T. WILLIAMSBURGH, T.T. STUYVESANT and T.T. BAY RIDGE, respectively. Petitioners have their principal places of business in Fort Lee, New Jersey. Wilmington Trust Co., as Trustee for General Electric Credit Corporation ("GECC") is the owner of the WILLIAMSBURGH and the BROOKLYN. U.S. Trust Company as Trustee for GECC is the owner of the STUYVESANT. U.S. Trust Company as Trustee for Security Pacific Bank and American Road Equipment Corporation is the owner of the BAY RIDGE. Seatrain Lines, Inc., a Delaware corporation, guaranteed the petitioners' performances of the charter parties.

Respondent Transamerica Delaval, Inc. ("Delaval"), formerly known as Delaval Turbine, Inc., is a Delaware corporation with its principal place of business in Trenton, New Jersey.

Pursuant to U.S. Sup. Ct. R. 28.1, petitioners advise that they have no parent companies, subsidiaries or affiliates.

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OPINIONS BELOW

The opinion of the Court of Appeals, sitting *in banc*, reported at 752 F.2d 903, appears in the Appendix to the Petition for Certiorari (Pet. App. 1a). The opinions of the United States District Court for the District of New Jersey were not reported but appear in the Appendix to the Petition for Certiorari (Pet. App. 37a, 72a).

—o—

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, sitting *in banc*, was entered on January 16, 1985, and a timely petition for rehearing was denied on February 13, 1985. The petition for a writ of certiorari was filed on May 13, 1985 and granted on October 7, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

—o—

STATEMENT OF THE CASE

This action sets forth claims within federal maritime and admiralty jurisdiction. 28 U.S.C. §1333. It involves the claims of the bareboat charterers of four 225,000 ton supertankers against Delaval, the manufacturer and designer of defective turbine units for the four ships. Delaval also supervised the installation of the turbines into the vessels during their construction in Brooklyn, New York.

Alleging Delaval's liability under theories of strict liability in tort (as to each of the four vessels) and negli-

gence (as to Richmond's claim for the 1980 incident involving the BAY RIDGE), the petitioners sought compensatory damages, for the repair costs and loss of income due to the unavailability of the vessels during repairs, in the approximate amount of $7,000,000.

The district court originally granted summary judgment dismissing the four counts alleging strict liability in tort, while acknowledging the maintainability of the BAY RIDGE negligence count (Pet. App. 71a). Subsequently, upon reconsideration, the district court also granted summary judgment dismissing the BAY RIDGE negligence count (Pet. App. 82a). After a panel of the Court of Appeals for the Third Circuit heard argument on November 17, 1983, the court ordered that the matter be scheduled for rehearing *in banc* (Pet. App. 32a). On November 13, 1984, the court of appeals, *in banc*, heard argument and, on January 16, 1985, the judgment of the district court was affirmed (Pet. App. 34a). The court of appeals determined that the damage caused to the charterers of the four vessels was not compensable under any of the tort theories alleged.

A. The STUYVESANT

The STUYVESANT sailed on her first voyage at the end of July, 1977. On December 11, 1977, while the STUYVESANT was preparing to enter the Port of Valdez, Alaska, a loud noise was heard emanating from, and superheated steam was detected leaking from, the high pressure turbine. At that point, no one could determine the source of the problem (J.A. 158-159; 165).

After berthing at Valdez on December 11, all the bolts around the area where the superheated steam was escaping were tightened and secured. The STUYVESANT departed Valdez on December 13, 1977. Shortly after departure, major problems occurred concerning the operation and maneuverability of the STUYVESANT, placing the safety of the vessel and her crew in jeopardy. During this time, the vessel encountered a major storm with her turbine not functioning at vibrating speed. Because of this lack of power and the mountainous seas (estimated to be at least 65 feet), the vessel drifted quite rapidly, toward the shore of the Gulf of Alaska (J.A. 159; 167). On Christmas Day, 1977, as the STUYVESANT attempted to continue her voyage, arrangements were made for certain personnel knowledgeable in the operations of the turbine to be helicoptered onboard the STUYVESANT to examine the defective machinery. This group included a representative of Delaval (J.A. 159).

The voyage was completed without injury to the crew, but it was later determined, when the STUYVESANT was berthed at the Triple A Shipyard in San Francisco, that the first stage steam reversing ring had, in fact, "disintegranted" and damaged other parts of the turbine (J.A. 160).

As an interim repair, a first stage steam reversing ring was taken from the BAY RIDGE (which was still under construction), transported to San Francisco, and installed in the STUYVESANT (J.A. 160). Since the BAY RIDGE had not been operational even for a sea trial, the ring which was taken from the BAY RIDGE was a new ring (J.A. 160).

The STUYVESANT departed San Francisco on February 2, 1978 after the interim repairs were made.[1] On April 8, 1978, the STUYVESANT re-entered the Triple A Shipyard in San Francisco, and the high pressure turbine was again opened and inspected. A determination was made that the first stage steam reversing ring that had been taken from the BAY RIDGE was damaged even though it was only in place for eight to nine weeks (J.A. 160-161). That ring was removed and a ring which had previously been installed in the BROOKLYN was removed and taken to San Francisco. There, it was reinforced and modified in accordance with the instructions and under the supervision of Delaval personnel. Again, interim repairs were made and the STUYVESANT departed the shipyard on April 11, 1978, remaining operational until August 13, 1978. At that time another inspection of the turbine was made, the "BROOKLYN ring" was removed and a newly designed and manufactured ring, materially different from the original, was installed by Delaval (J.A. 161).

B. The BROOKLYN and the WILLIAMSBURGH

During the time that the STUYVESANT was experiencing difficulties with the first stage steam reversing ring, inspections were made on the high pressure turbines in the BROOKLYN and the WILLIAMSBURGH. These inspections revealed that the rings installed in those vessels were disintegrating and that in all probability, but for these in-

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1. It should be noted that a great deal of the damage which petitioners seek to recover from Delaval were, in fact, paid to Delaval (J.A. 49, 52, 55, 57, 61, 63, 65, 68, 73, 190).

spections, the BROOKLYN and WILLIAMSBURGH would have encountered experiences similar to the STUYVESANT (J.A. 161-162).

C. The BAY RIDGE

On March 13, 1980, while at sea, the BAY RIDGE's low pressure turbine sustained damage necessitating a reduction in speed and repairs at the nearest port of refuge. Particularly, it was demonstrated (at least Delaval did not take issue with this in successfully moving for summary judgment) that Delaval failed to supervise properly the installation of the astern guardian valve in the BAY RIDGE (J.A. 179). As a result, the low pressure turbine was improperly exposed to steam, causing damage to the BAY RIDGE off the east coast of South America en route to Valdez (J.A. 180).

D. Summary

Each of the petitioners was damaged, in varying amounts, as a result of the "disintegrating" ring designed and manufactured by Delaval. Petitioner Richmond was also damaged by Delaval's negligent supervision of the installation of the BAY RIDGE's low pressure astern guardian valve. These damages, which consisted of the costs of repair as well as the loss of the use of the vessels during repairs, were approximated at $7.000,000.

Despite overwhelming authority directly to the contrary, the court of appeals below affirmed the district court's summary dismissal of petitioners' action. That judgment was based solely on the disputed fact (*see* Point IC, *infra*) that neither Delaval's defective first stage

steam reversing ring nor Delaval's negligent supervision of the installation of the BAY RIDGE's low pressure astern guardian valve created "an unreasonable risk of harm." Yet the nearly unanimous experience of admiralty courts has been to allow recovery on strict liability or negligence theories regardless of the presence or absence of "an unreasonable risk of harm."

Petitioners urged in support of the issuance of a writ of certiorari that the conflict among the circuits created by the decision below left a significant legal issue of admiralty law unsettled and that the substantial efforts by this Court to have uniform standards apply in such matters was frustrated by the Third Circuit's decision. To reestablish uniformity in admiralty this Court granted certiorari on October 7, 1985 to review the decision below. For the reasons expressed herein, petitioners respectfully urge the reversal of the judgment below.

SUMMARY OF ARGUMENT

The traditions of admiralty law, as pronounced by this Court for over a century, have been securely anchored by the recognition of doctrines of law espousing "simplicity and practicality." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959) (Stewart, J.); *The LOTTOWANNA*, 88 U.S. (21 Wall.) 558,

575 (1875) (Bradley, J.). The subtle conceptual distinctions and the "classifications and subclassifications" bred by the common law of the 50 states, as Mr. Justice Stewart stated for the Court in 1959 are alien to admiralty law. *Kermarec, supra.*

Nevertheless, despite this Court's clear guidance as to the policies and traditions in this area of law, the Court of Appeals for the Third Circuit chose, in this matter, to be the sole court of appeals to radically depart from those long established rules of law.[2]

Here, petitioners sustained damages in the form of repair costs and the loss of the use of the vessels proximately caused by Delaval's defectively designed and manufactured turbines (and, in the case of the fifth count of the second amended complaint, Delaval's improper supervision of the turbine's installation).

The Third Circuit held that in either an admiralty strict liability in tort action or admiralty negligence action, the plaintiff must demonstrate, as part of its cause

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[2]At the time of the Third Circuit's decision a number of other circuits had applied a simple and practical rule to both admiralty strict liability in tort actions, *see, e.g., Emerson G.M. Diesel v. Alaskan Enterprise*, 732 F.2d 1468 (9th Cir. 1984); *Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984), and admiralty negligence actions, *see, e.g., Compania Pelineon De Nevegacion v. Texas Pet. Co.*, 540 F.2d 53 (2d Cir. 1976), *cert. denied* 429 U.S. 1041 (1977); *Jig The Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied* 424 U.S. 954 (1976); *Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401 (5th Cir. 1982), *cert. denied* 459 U.S. 1036 (1982); *National Steel Corp. v. Great Lakes Towing Co.*, 574 F.2d 339 (6th Cir. 1978). After the Third Circuit's decision, the Eighth Circuit decided a case directly contrary to the Third Circuit's approach and noted its disagreement with the decision below. *Ingram River Equipment, Inc. v. Potts Industries, Inc.*, 756 F.2d 649 (8th Cir. 1985) *cert. pending* Docket No. 85-12 (Petition filed July 5, 1985).

of action, proof of damage to a person or property other than the product itself. While the Third Circuit characterized this additional element as requiring proof that the product caused "an unreasonable *risk* of harm," the Third Circuit's ultimate resolution of the dispute ignored the true meaning of that phrase as well.[3] If the *risk* of harm is what this additional element required, then, as demonstrated by the dissent of Judge Becker below, a reversal on the first count of the second amended complaint (concerning the STUYVESANT) was mandated. 752 F.2d at 915-917; Pet. App. 24a-29a.

Whether the Third Circuit required proof of an actual personal injury or property damage beyond physical damage to the product itself, or just the *risk* of such additional damage is, we urge, irrelevant. The adoption of either element as a predicate for recovery in an admiralty strict liability or negligence action, as will be demonstrated hereafter, is (1) inconsistent with the prior course of admiralty law and is repugnant to the uniformity which this

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[3]The decision below, in a nutshell, concluded that the petitioners could not recover the costs of repair and the damage incurred due to the loss of the use of the vessels because the defective product posed no "unreasonable risk of harm to persons or property other than the product itself . . ." 752 F.2d at 904; Pet. App. 3a. However, the court went on to limit the phrase "unreasonable risk" by holding "that *because no persons or property were injured or damaged*, no tort recovery was appropriate in this case given the qualitative nature of the defect and the gradual manner in which the defect manifested itself." 752 F.2d at 910; Pet. App. 14a. The contradiction in terms between the purported requirement of "unreasonable *risk* of harm," 752 F.2d at 904; Pet. App. 3a (emphasis added), and the result reached by the majority below, requiring that persons or property, in fact, be *actually injured* by the defect, 752 F.2d at 910; Pet. App. 14a, is, in short, confusing and inconsistent with traditional admiralty precepts. *See* Point IA, *infra*.

body of law is required to possess by the Constitution, (2) introduces an artificial element into such causes of action, and (3) has the effect of encouraging careless or negligent conduct on the part of product manufacturers.

Accordingly, it is urged that the Third Circuit's approach be rejected and the judgment reversed.

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ARGUMENT

I.

PROOF OF ACTUAL DAMAGE TO PERSON OR PROPERTY, OR AN UNREASONABLE RISK OF SUCH HARM, SHOULD NOT BE AN ELEMENT OF A CAUSE OF ACTION IN AN ADMIRALTY STRICT LIABILITY IN TORT OR NEGLIGENCE ACTION

A. Such an Element is Inconsistent With Traditional Admiralty Precepts of "Simplicity and Practicality"

In 1959 this Court was asked to rule that admiralty should impose upon a shipowner the distinction between invitees and licensees applied in nearly all common law states to landowners. While that particular issue is of no great importance here, the Court's approach to that issue is. In speaking for the Court, Mr. Justice Stewart said:

> . . . modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner

owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict . . .

For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality.

Kermarec, supra, 358 U.S. at 630-631 (emphasis added; footnote deleted); *cf., Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953).

Despite the cogent direction of this Court in *Kermarec,* the Third Circuit applied a rule which has hopelessly complicated this specific area of admiralty law. The Third Circuit's opinion not only glorifies conceptual niceties at the expense of "simplicity and practicality" but also mistakenly injects inappropriate state law concepts into this uniform federal body of law.[4]

It is not only the conceptual niceties *per se* of some common law doctrines which admiralty abhors, but also the fact that such "classifications and subclassifications" are derived from state law that must give the Court pause. In *The LOTTAWANNA,* Mr. Justice Bradley's opinion for the Court captured precisely why the importation of state law into admiralty is inappropriate:

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[4]*See, e.g., East River S.S. v. Delaval Turbine, Inc.,* 752 F.2d 903, 908 (3d Cir. 1985) (emphasis added):

> We believe that the better view, *and one in accord with the prevailing view on land,* is that damage to a defective product is not actionable in tort unless the design defect creates an unreasonable risk of harm to persons or property other than the product itself.

The court below slavishly followed its own decision in *Pennsylvania Glass Sand v. Caterpillar Tractor Co.,* 652 F.2d 1165 (3d Cir. 1982) although that case expressed only an opinion as to Pennsylvania law.

> One thing, however, is unquestionable: the Constitution must have referred to a system of law co-extensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

88 U.S. (21 Wall.) at 575. *See also, Foremost Insurance Co. v. Richardson,* 457 U.S. 668, 677 (1982); *The Steamship ST. LAWRENCE,* 66 U.S. (1 Black) 522, 527 (1862) (Taney, C.J.); *Moragne v. States Marine Lines,* 398 U.S. 375, 402 (1970).

The court below, however, demonstrated an unfortunate partiality with its own prior decisions as to the content of *state* law without due regard for the prior decisions of this Court which warn of the inconsistencies of these separate bodies of law.[5]

Although this Court has not yet, in its role as the final arbiter of the content of admiralty law, decided the issues presented, it is clear, for the reasons expressed hereafter, that the rules adopted by the majority of the courts of appeals on the issues presented herein are the appropriate rules for this Court to adopt, regardless of their potential conflict with the law of some of the various states.

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[5]*See* n. 4, *supra.*

B. The Third Circuit's Decision Injects an Artificial Element Into Petitioners' Causes of Action Which is Repugnant to Admiralty and Should Be Rejected

The second amended complaint set forth five counts—the first four counts alleging causes of action sounding in strict liability in tort[6] and the fifth count sounding in negligence due to Delaval's failure to properly supervise the installation of the astern guardian valve of the BAY RIDGE. While the Third Circuit chose to treat all of these claims identically[7], it is respectfully suggested that this collective treatment was erroneous. Although the imposition of the Third Circuit's additional element of proof as to all of petitioners' claims was erroneous, the strict liability claims and the negligence claim are hereafter considered separately.

1. The Strict Liability In Tort Claims

Strict liability actions were born out of the marriage of contract and tort generally recognized as taking place in 1916, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). While this curious combination was intended as a device to avoid privity problems, it also has

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[6]The plaintiffs in the first four counts are Queensway, Kingsway, East River and Richmond, respectively, who are the bareboat charterers, *i.e.*, owners *pro hac vice*, of the STUYVESANT, WILLIAMSBURGH, BROOKLYN and BAY RIDGE, respectively. Richmond is the sole plaintiff in the fifth count.

[7]"Our reasoning in this case is equally applicable to products liability cases brought in negligence and those brought in strict liability, and thus is applicable to all five counts of the second amended complaint." 752 F.2d at 908 n. 2; Pet. App. 12a.

created additional conceptual problems no doubt unforeseen by its original creators. Noteworthy among those problems is the so-called "quantitative-qualitative" distinction accepted by a number, but not all, of land-based jurisdictions. It is this land-based principle which the court below accepted and defined as follows, in rejecting the claims of the petitioner: "We also find that the manner in which the damage to the turbine occurred implicates the expectation-bargain policy of warranty law rather than the safety-insurance policy of tort law." 752 F.2d at 909; Pet. App. 13a.[8] Just how a designer or manufacturer is to know whether an event, proximately caused by his product, implicates "the expectation-bargain policy" as opposed to "the safety-insurance policy" is unknown.

In any event, whereas the contract-tort marriage in the common law apparently took place in 1916, it can fairly be said that the same marriage was recognized in admiralty nearly a century earlier.

In 1824, this Court was faced with the argument that compensation for the loss of the use of a vessel is available only in a contract, as opposed to a tort, action. (This is the very distinction which the Third Circuit herein approved.) Mr. Justice Story, however, speaking for the Court, rejected the argument:

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[8]Noteworthy is the court's reliance on its expression of Pennsylvania law in *Pennsylvania Glass Sand, supra*, n. 4, in support of this statement. Indeed, the decision below is essentially bereft of citation to maritime cases, but repeatedly applauds *Pennsylvania Glass Sand, supra*, and the now bankrupt decision of *Seely v. White Motor Corp.*, 63 Cal.2d 9, 45 Cal. Rptr. 16, 403 P.2d 145 (1965) which was repudiated to a large degree in *J'Aire Corp. v. Gregory*, 24 Cal.3d 799, 157 Cal. Rptr. 407, 598 P.2d 60 (1979).

> But it is now said, that demurrage always arises *ex contractu,* and, therefore, cannot furnish any rule of compensation in cases of tort. The practice in Courts of Admiralty has certainly been otherwise; and the very cases cited at the bar show that no distinction has been taken, as to its application, between cases of contract and cases of tort. In truth, demurrage is merely an allowance or compensation for the delay or detention of a vessel. It is often a matter of contract, but not necessarily so. The very circumstance that in ordinary commercial voyages, a particular sum is deemed by the parties a fair compensation for delays, is the very reason why it is, and ought to be, adopted as a measure of compensation, in cases *ex delicto.*

The APOLLON, 22 U.S. (9 Wheat.) 362, 377-378 (1824). Again, before the turn of the century, the Court held "[t]hat the loss of profits or of the use of a vessel pending repairs, or other detention, arising from a collision, *or other maritime tort,* and commonly spoke of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question." *The CONQUEROR,* 166 U.S. 110, 125 (1897). That these cases speak of damages consisting of the loss of the use of the vessel, as opposed to the cost of repair (both of which are sought by petitioners) is of no concern since it is the former which has given the most pause, but yet was approved in *The APOLLON* and *The CONQUEROR.*[9]

In recent years the question of what elements of proof are required to make out a *prima facie* strict liability case

[9]Indeed, the manufacturers' standard argument of the potential for unforeseen damages as a cause for limiting liability in such cases is negated by the adjustment admiralty has made in the law of damages when loss of profits are sought. *See, The CONQUEROR, supra,* 166 U.S. at 133 ("reasonable certainty of pecuniary loss" must be shown).

in admiralty has arisen with greater frequency. Despite the number of decisions on this subject recently, there is almost universal condemnation of the approach taken by the Third Circuit.[10]

In *Emerson G.M. Diesel v. Alaskan Enterprise,* 732 F.2d 1468 (9th Cir. 1984) a rupture in the vessel's reduction gear hose disabled the port engine. However, the vessel was only two hours out of port and was able to return on one engine. 732 F.2d at 1470. The district court awarded the vessel owner damages for lost profits and the cost of repairing the engine. The Ninth Circuit affirmed the award, rejecting the applicability of the so-called *Seely* doctrine.[11] The logic of the Ninth Circuit's decision is compelling. In rejecting the need for proof of personal injury or property damage (beyond the product itself), Judge Pregerson stated:

> Requiring recovery for economic loss to depend on the presence of personal injury or property damage is an arbitrary distinction leading to opposite results in cases that are virtually the same. For instance, if the reduction gear unit in the ALASKAN ENTERPRISE had caused some physical damage to the ship itself or its crew members, the appellants would have unquestionably recovered their lost profits. Yet, because only the unit itself was damaged, *Seely,* if followed, would operate to deny the recovery of lost profits, even though the overall loss in both cases would be essentially equivalent.

732 F.2d at 1474. Similarly, in this case, if the STUYVESANT had scraped another vessel due to the loss of

[10]Only *Maru Shipping Company, Inc. v. Burmeister & Wain American Corp.,* 528 F.Supp. 210 (S.D.N.Y. 1981) appears to reach the same conclusion as the court below.

[11]*See* n. 7, *supra.*

power and maneuverability caused by the disintegrating ring, the sole additional damage consisting of the inconsequential removal of paint from her hull, the repair costs and loss of use damages would be recoverable. But can anyone say the risk of harm is not identical if the STUYVESANT narrowly missed another vessel? Or, if the steam escaping from the STUYVESANT's turbine had burned a seaman's arm, no matter how minor the injury, under the view of the court below, Queensway would have been able to obtain the damages sought herein. In the absence of the minor burn, according to the decision below, Queensway is without remedy. Yet the injured seaman would have no interest in Queensway's recovery, and vice versa; and the recovery of one's damages has no logical relation to the other's.[12]

In short, the decision below has no regard for what Judge Becker referred to in his dissenting opinion below as a "near miss" (perhaps the phrase "near hit" is more appropriate). In so holding the majority below has not only created a standard enormously difficult to apply, having no relation to the true controversy, but also one which provides no guidance to the designers and manufacturers of vessels or vessel components. The decision below cautions manufacturers that if their product causes damage to persons or property other than their product, then they will be called upon to respond in damages for the vessel's repair costs and lost profits. But those manufacturers need not adjust their methods of

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[12]*See, e.g., People Exp. Airlines, Inc. v. Consolidated Rail,* 100 N.J. 246, 261 n. 4, 495 A.2d 107 (1985) (" . . . no parasitic relationship with another tort should be required before determining whether the injury is compensable").

design or production to account for potential dangers which do not come to pass, but which nevertheless cause the vessel the same losses. In other words, only hindsight can determine when liability attaches.

In rejecting this artificial distinction, petitioners and the *Emerson* court are not alone. The Courts of Appeals for the Fifth[13], Eighth[14], and Eleventh Circuits[15], the Supreme Court of Washington[16], several district courts[17], and, in an unreported decision, the Fourth Circuit[18], all reject the arbitrary distinction recognized by the court below.

The argument that the rule urged by petitioners herein has the potential to expose manufacturers to "damages of unknown and unlimited scope," *Seely, supra,* 63 Cal. 2d at 17, 45 Cal. Rptr. at 22-23, 403 P.2d at 150-151, should be rejected. The phrasing of the vessel owner's loss as "economic loss" ostensibly supports, but in reality does not, this argument. "Economic loss," as stated by Judge Pregerson in *Emerson,* "is no different from personal injury

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[13]*Jig The Third, supra* at n. 2.

[14]*Ingram River, supra* at n. 2.

[15]*Miller Industries, supra* at n. 2.

[16]*Berg v. General Motors Corp.,* 87 Wash. 2d 584, 555 P.2d 818, 1977 A.M.C. 58 (1976).

[17]*Laurentine, Inc. v. General Motors Corp.,* 1980 A.M.C. 715 (S.D. Ala. 1978); *Miller Industries v. Caterpillar Tractor Co.,* 473 F.Supp. 1147 (S.D. Ala. 1979), vacated on other grounds 516 F.Supp. 84 (S.D. Ala. 1980); *Prudential Lines, Inc. v. Avondale,* 1984 A.M.C. 2036 (S.D.N.Y. 1983).

[18]*Vessel Management, Inc. v. Caterpillar Tractor Co.,* Docket No. 82-1160, 1161 (4th Cir. 1982).

or property damage in the sense it is also a loss that is proximately caused by the defendant's conduct." 732 F.2d at 1474. That such losses will be occasioned by a defective reduction gear hose (as in *Emerson*), a defective sun gear and wrist pin (as in *Miller Industries*) or first stage steam reversing ring (as in this case) are known all too well by their manufacturers, save only those who would disingenuously object. Again, the most cogent response to *Seely's* lament as to the potential exposure to "damages of unknown and unlimited scope" can be found in *Emerson:*

> The manufacturer knows the purpose for which its product is to be used and by whom. Although all purchasers are not identical, the manufacturer can determine within a reasonable range of predictability the ramifications of a product failure for the ordinary user. Having this information, the manufacturer can include in its costs the expense of adequate insurance coverage.

732 F.2d at 1474.

In short, petitioners do not urge a doctrine of law which would impose liability without fault or which would expose a manufacturer to an endless line of unforeseen suitors seeking unexpected losses. To the contrary, petitioners respectfully request that this Court recognize the doctrine followed almost universally by the admiralty courts which have approached it to date. That is, when the identity of the plaintiff is reasonably foreseeable, and the losses are directly and proximately caused by a defective product, liability should attach and the manufacturer should redress such losses. Such a rule will "provide manufacturers with additional incentive to spread the cost of insuring against losses resulting from product defects,

as well as an incentive for manufacturers to produce safer products." *Emerson, supra,* 732 F.2d at 1473.[19]

2. The Negligence Claim

Petitioner Richmond, as bareboat charterer (and thus, owner *pro hac vice*) alleged in the fifth count Delaval's negligent supervision of the installation of the low pressure astern guardian valve in the BAY RIDGE, which caused this valve to be installed in reverse. This reverse installation caused steam to enter upon the low pressure turbine which caused heating, stretching and breaking of the last row blading of the turbine. This damage was experienced by the BAY RIDGE, in March, 1980, while she was off the east coast of South America en route, via Cape Horn, to Alaska (J.A. 179-180).

In successfully moving for summary judgment in the district court, Delaval's sole supporting affidavit (executed by its counsel) did not take issue with these facts but rather claimed that the events concerning the BAY RIDGE did not create a danger to ship or crew, as a matter of law. The district court originally denied the motion on this fifth count of the second amended complaint (Pet.

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[19]Delaval has contended in the past, and will no doubt continue to urge, that the Uniform Commercial Code is applicable to petitioners' first four counts. This argument, though, has been logically rejected by the Fifth Circuit in *Jig The Third, supra,* 519 F.2d at 175.

Moreover, such an approach again runs aground of what Mr. Justice Bradley described as the unwarranted (indeed, constitutionally repugnant) problem of placing maritime law "under the disposal and regulation of the several States." *The LOTTAWANNA, supra,* 88 U.S. at 575. The Uniform Commercial Code is a creation of the States (it also varies from state to state) and cannot override the rules of admiralty.

App. 71a), but subsequently reconsidered (Pet. App. 73a) and entered summary judgment (Pet. App. 82a). The court of appeals affirmed, determining, as urged by Delaval, that the element of "an unreasonable risk of harm" is required as a predicate to the recovery of damages even when the theory alleged is negligence:

> Our reasoning in this case is equally applicable to products liability cases brought in negligence and those brought in strict liability, and thus is applicable to all five counts of the second amended complaint. One of the cases we rely on in the text, *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), involved negligence as well as strict liability claims, and the court in that case did not distinguish between the two theories in applying the rule against recovery of damages where an unreasonable risk of harm is not present.

752 F.2d at 908 n.2; Pet. App. 12a. While it is odd that the majority should so conclude after apparently determining otherwise at another point in their opinion[20], it is more curious that reliance would be placed on *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965). The Supreme Court of California has repudiated the *Seely* decision in *J'Aire Corp. v. Gregory*, 24 Cal. 2d 799, 157 Cal. Rptr. 407, 598 P.2d 60 (1970), determining that so-called "economic loss" may be recovered in an

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[20]It is true that recovery for the value of the use of a ship for the time it is put out of use by tortious conduct is traditionally an element of damages *in a tort suit*. This element of damages is known as "demurrage". In these cases, the traditional tort policy of full compensation is enforced in admiralty, as it is on land.

752 F.2d at 907; Pet. App. 9a (emphasis added).

action based on the negligence of the product manufacturer.[21]

Moreover, the imposition of a requirement of "an unreasonable risk of harm" makes even less sense in a negligence action than it does in a strict liability action. Accordingly, most courts of appeals have permitted recovery for the cost of repairs and the loss of the use of a vessel, without even considering the additional element urged by the court below.

In *Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401 (5th Cir. 1982), cert. denied 459 U.S. 1036 (1982), the court affirmed an award for the repairs and loss of use in favor of the owner of the S/S KATRIN. The court held that Todd Shipyard's negligent performance of its agreement to repair the KATRIN was a tort giving rise to the recovery of all damage proximately caused thereby. Despite the court's description of that case as a "blockbuster maritime action", 674 F.2d at 405 n. 1, and despite the noted experience of that court of appeals in maritime matters, no one appears to have ever suggested that the vessel had to show an injury to person or property other than the product itself, or the unreasonable risk of same, to obtain its award. Indeed, the operative facts in *Todd* demonstrate that the owner of the

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[21]*See also, Pisano v. American Leasing*, 146 Cal.App.3d 194, 194 Cal. Rptr. 77 (1983); *Huang v. Garner*, 157 Cal.App.3d 404, 203 Cal. Rptr. 800 (1984); and the discussion of these California cases in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 128-129 (N.D. Cal. 1984). Thus, despite the irrelevancy of the content of California law to the issues faced by the court below, even that slim reed does not support the decision below.

KATRIN could show no more than what petitioners demonstrated herein:

> In July, 1976, passing the Irish coast at Cork, the turbines suddenly seized and stopped. The vessel began drifting towards the coast and the danger was such that the master ordered the chief engineer to try to operate the turbines, no matter what their condition, in order to save the ship and crew. The chief engineer started the turbines and operated them long enough to bring the vessel away from the coast and subsequently into the Cork harbor. The damage to the HP and LP turbines due to the casualty was so extensive that the vessel was sold for scrap.

674 F.2d at 407. In *Jig The Third*, although the vessel sank, and thus there was presented proof of damage beyond the so-called economic losses of the owners, this additional factor was insignificant to the court's decision:

> There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries, but also property damage to the defective product itself.

519 F.2d at 175, quoting with approval Prosser, *The Law of Torts* (4th Ed., 1971) § 101 at 665-666. The courts in *Miller Industries, supra*, 733 F.2d at 817-818, and *Ingram River, supra*, 657 F.2d at 653, are in accord with this reading of *Jig the Third*, and also permit recovery of so-called "economic losses" in negligence actions.

In essence, a cause of action for negligence is stated when a plaintiff alleges the existence and breach of a duty of care attributable to a defendant which proximately causes damage to the plaintiff. No logical reason has ever been articulated as to why additional proof of personal injury or property damage other than to the product itself, or the risk of same, is necessary to complete the cause of action. (Indeed, no maritime decision other than that of the court below supports this contention.) Since the concept of duty lies at the heart of any negligence action, no refinement of a product manufacturer's duty is caused by requiring this additional proof. In other words, a product manufacturer cannot possibly bring his conduct within the proper duty of care if that duty cannot be determined to exist until after the event complained of.

In applying the decision below to a set of facts such as that involving the STUYVESANT in December of 1977, the Third Circuit would say that Delaval owed petitioner Queensway no duty in designing and manufacturing the STUYVESANT's first stage steam reversing ring. Yet taking the same set of facts, and hypothesizing further that during the STUYVESANT's loss of maneuverability she had a slight collision with another vessel and suffered an inconsequential loss of paint from her hull, then, at the time of manufacturing, Delaval *did* owe Queensway a duty of care. Only hindsight can determine the existence of a duty of care if the Third Circuit's decision is followed.

Petitioners urge the adoption of the rule most notably described in *Emerson*[22] since it provides the most lucid

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[22]Delaval has urged in the past that the nature of the enterprise (here, the transportation of oil) distinguishes this case from others, *i.e., Emerson, Miller Industries* and *Jig The Third*, all *supra* at n. 2, which involved fishing vessels (Del. Br. in Opp. to Cert. at 10). What Delaval conveniently omitted in its prior brief was that *Ingram River*, which expressly rejected the Third Circuit's holding, did not involve a fishing vessel.

(Continued on following page)

guidance to the district courts, as well as the litigants, and is the rule most consistent with the course of admiralty as this Court, and Congress[23], have previously declared it.

C. Assuming Arguendo, The Adoption of a Rule Which Requires Proof of an "Unreasonable Risk of Harm," Reversal on The First and Fifth Counts is Required

The Third Circuit ostensibly adopted the requirement that a plaintiff must prove the existence of an "unreasonable risk of harm" to state a cause of action in either a strict liability or negligence action. As we have demonstrated previously, however, what the Third Circuit seems to have ultimately held was that this additional element requires proof of an actual physical injury or property damage other than to the product itself. For the reasons set forth previously, this Court should reject both of these purported additional elements of proof.

(Continued from previous page)

We fail to see what beneficial effects are derived from discriminating among the types of vessels involved. It would seem that if there is to be any discrimination it should be *in favor of* vessels which carry huge amounts of oil across the globe and against the manufacturers of such vessels, or vessel components, since the failure of such a manufacturer to live up to his duty to make a safe product can have extraordinary environmental effects (as opposed to the limited damage which would occur if a fishing vessel had a similar accident).

[23]*See*, e.g., 46 U.S.C. § 183 (the limitation of liability act). This Court has recognized that this enactment is to be administered "not 'with a tight and grudging hand' but 'broadly and liberally' so as 'to achieve its purpose to encourage investments in shipbuilding . . .'" for the benefit of shipowners. *Coryell v. Phipps*, 317 U.S. 406, 411 (1943).

Nevertheless, should the Court determine that proof of an "unreasonable risk of harm" is necessary, the judgment with regard to the first and fifth counts must be reversed. Submitting nothing but the affidavits of its counsel, Delaval, as the party seeking summary judgment, failed to demonstrate, as a matter of law or undisputed fact, the absence of an "unreasonable risk of harm." Moreover, in response, petitioners demonstrated that the circumstances involving the STUYVESANT[24], although undisputed by Delaval, at least raised a question of fact as to the risk of harm. While the BAY RIDGE did not encounter the storm conditions faced by the STUYVESANT, the allegations of the fifth count, we urge, give rise to a question of fact as to the potential hazard involved.

Beyond this, since the Third Circuit acknowledges that recovery should turn on whether the product causes "gradual deterioration" as opposed to a "sudden or calamitous" occurrence, 752 F.2d at 909; Pet. App. 13a, we fail to see how such a standard could be accurately or appropriately applied on motion for summary judgment. Since the proponent of that motion provided no evidence

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[24]On December 11, 1977, a loud noise was heard emanating from, and superheated steam was detected as leaking from the STUYVESANT's high pressure turbine. That same day, the bolts in the area of the steam leak were tightened. Two days later, after her departure from Valdez, the STUYVESANT encountered major problems with her operation and manuverability while proceeding through a major storm (with mountainous seas estimated to be at least 65 feet). Due to the loss of maneuverability, and proceeding at less than vibrating speed, the STUYVESANT found herself drifting, quite rapidly, toward the shore of the Gulf of Alaska. Despite the obvious danger, the STUYVESANT arrived safely at her destination (J.A. 167).

to support the alleged "gradual deterioration" of these turbines, such a dubious standard was not correctly applied here.[25]

II.

THE DECISION BELOW DISCOURAGES THE PRODUCTION OF SAFER VESSELS AND VESSEL COMPONENTS AND SHOULD BE REVERSED BY THIS COURT

The decision of the Court of Appeals for the Third Circuit, if permitted to stand, has the effect of condoning and, perhaps, even encouraging carelessness on the part of those who manufacture and design vessels and vessel components. No court which has dealt with this issue disputes that the concept of "strict liability in tort" exists in admiralty. The intent of that theory of liability is to place the burden of loss on the creator of a product placed in commerce so as to encourage the production of safer and more useful products. *See Emerson, supra.* To fulfill that intent unnecessary and arbitrary restrictions should not be appended to that doctrine of law.

The products in question herein are the turbines which propel the mammoth vessels chartered by the petitioners. These vessels were intended and were in fact used for the carriage of large amounts of oil considerable distances around the globe. Catastrophes involving such vessels, and such as was faced, but fortunately not realized, by the

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[25]The Third Circuit's conclusion that the first stage steam reversing ring on the STUYVESANT "gradually deteriorated" is utterly stunning in light of the undisputed fact that construction of the STUYVESANT was not even completed until July, 1977, 752 F.2d at 905; Pet. App. 3a, only five months prior to the incident in question.

STUYVESANT are rarely minor. An oil "spill" from such a vessel can have devastating effects on the vessel and crew and can permanently damage the environment. *See, e.g., In re Oil Spill by "AMOCO CADIZ,"* 659 F.2d 789, 791 (7th Cir. 1981); *see also, In re Oil Spill by "AMOCO CADIZ,"* 1984 A.M.C. 2123 (N.D. Ill. 1984).

While such a disaster did not take place herein, the rule of law announced by the court below placed the burden of loss on the victims of a product manufacturer's misconduct. In so doing, it removes an impetus to manufacturers to create safer and better products in an industry where failure to do so not only can produce grave injury to ship and crew, but also can have monumental effects on the environment.

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CONCLUSION

Based on the foregoing, it is respectfully requested that the judgment of the United States Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 84-1726

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EAST RIVER STEAMSHIP CORP., KINGSWAY TANKERS, INC., QUEENSWAY TANKERS, INC., and RICHMOND TANKERS, INC.,

Petitioners,

vs.

TRANSAMERICA DELAVAL INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF

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QUESTION PRESENTED

May petitioners, charterers of oil tankers, maintain an action in tort under federal maritime law against the seller of main propulsion units for the tankers, arising from an alleged product defect, where the damage sustained was confined to the units themselves and consisted solely of internal deterioration and breakdown, and there was no unreasonable risk of harm to persons or other property?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

This is an action by petitioners, charterers of oil tankers, against respondent Transamerica Delaval Inc. ("Delaval"), the manufacturer of the main propulsion units of the vessels, to recover damages in tort under federal maritime law arising from alleged product defects. Petitioners seek review of the judgment of the United States Court of Appeals for the Third Circuit, in banc, which affirmed the judgment of the United States District Court for the District of New Jersey dismissing the action.

I.

Vessels Involved

In or about 1969, Delaval and Seatrain Shipbuilding Corp. ("Shipbuilding"), a wholly-owned subsidiary of Seatrain Lines, Inc. ("Seatrain"), entered into an agreement, negotiated in New York (JA-171), whereby Delaval agreed to design and manufacture main propulsion units for ships to be built by Shipbuilding.[1] Pet. App. at 38a-39a; JA-74-75, 192-93. The units were delivered to Shipbuilding at its shipyard in Brooklyn, New York (Pet. App. at 38a-39a), and Delaval supervised their installation in four vessels: the T.T. Stuyvesant (the "Stuyvesant"), the T.T. Williamsburgh (the "Williamsburgh"), the T.T. Brooklyn (the "Brooklyn"), and the T.T. Bay Ridge (the "Bay Ridge"). Pet. App. at 39a; JA-192-93, 196, 198-99.

Shipbuilding constructed each vessel under separate construction contracts with Polk Tanker Corporation, Tyler Tanker Corporation, Langfitt Shipping Corporation, and Fillmore Tanker Corporation, each of which is a wholly-owned subsidiary of Seatrain; each subsequently transferred title to the vessel to its current owner, none of which is a party to this action. Pet. App. at 39a & n.1; JA-11, 193, 196, 198, 199. Petitioners are the four entities to which each owner allegedly chartered the vessels. Pet. App. at 39a; JA-191-92, 193, 196, 198-99.

A. The Stuyvesant

Construction of the Stuyvesant was completed in July 1977. 752 F.2d at 905, Pet. App. at 3a. On December 11, 1977, as the Stuyvesant was entering the Port of Valdez in Alaska, steam was discovered to be issuing from the junction of its steam inlet control valve chest and high pressure turbine casing. 752 F.2d at 905, Pet. App. at 3a-4a; Pet. App. at 40a. There is no

1 References to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari, "JA" to the Joint Appendix, and "Pet. Br." to the Brief of Petitioners.

evidence that the steam escape problem was related, either as cause or effect, to any turbine problem which developed later. Pet. App. at 69a. The steam escape problem was corrected upon the ship's arrival in Valdez, and no damages are alleged to have occurred in connection with the escaping steam. Pet. App. at 69a. The Stuyvesant then loaded its cargo of oil in Valdez and proceeded on December 13, 1977 for Parita Bay, Panama. Pet. App. at 40a; JA-159.

Shortly after leaving Valdez, Alaska, the Stuyvesant experienced a problem with its high pressure turbine which prevented the ship from attaining its normal speed on the Alaska-to-Panama-to-San Francisco voyage. 752 F.2d at 905, Pet. App. at 4a. An unsworn letter submitted in opposition to summary judgment noted that the Stuyvesant also experienced high seas and some drifting off the coast of Alaska in a storm. JA-166-67. Nevertheless, the ship made sufficient headway and proceeded on its journey to Panama without stopping for inspection or repairs and discharged its cargo there. 752 F.2d at 905, Pet. App. at 4a; Pet. App. at 69a. After stopping in Panama to discharge its cargo, the Stuyvesant continued to San Francisco, California where it arrived on January 27, 1978, approximately seven weeks after leaving Alaska. 752 F.2d at 905, Pet. App. at 4a; Pet. App. at 40a.

The reduced speed of the Stuyvesant, associated with the gradual internal deterioration of the turbine, did not pose an unreasonable risk of injury to persons or property. 752 F.2d at 909, Pet. App. at 13a; Pet. App. at 69a. In San Francisco an inspection of the Stuyvesant's high pressure turbine revealed damage to several of its parts, including the first stage steam reversing ring ("guide bucket ring"). 752 F.2d at 905, Pet. App. at 4a; Pet. App. at 40a. After the damaged parts had been replaced with similar parts taken from the Bay Ridge, which was then under construction, the Stuyvesant resumed operation. 752 F.2d at 905, Pet. App. at 4a; Pet. App. at 40a.

In April 1978, the Stuyvesant again docked in San Francisco, where its high pressure turbine guide bucket ring was inspected and found to have deteriorated. 752 F.2d at 905, Pet.

App. at 4a; Pet. App. at 40a. The guide bucket ring, which had previously been taken from the Bay Ridge, was replaced by another guide bucket ring, taken from the Brooklyn. 752 F.2d at 905, Pet. App. at 4a; Pet. App. at 40a.

In August 1978, the Stuyvesant also docked in San Francisco where it received newly designed rings for both its high and low pressure turbines. 752 F.2d at 905, Pet. App. at 4a; Pet. App. at 40a; JA-196.

B. The Brooklyn And The Williamsburgh

The two ships constructed before the Stuyvesant—the Brooklyn in 1973 and the Williamsburgh in 1974 (752 F.2d at 905, Pet. App. at 4a; JA-196, 198)—were inspected for damage in port in March 1978. Pet. App. at 40a-41a. Neither the Brooklyn nor the Williamsburgh had "evinced *any* signs of malfunctioning while in use." Pet. App. at 68a (emphasis in opinion). The ships were inspected because inspection of the Stuyvesant's turbine in January 1978 disclosed turbine damage. 752 F.2d at 905, Pet. App. at 4a; Pet. App. at 40a. Examination of both ships revealed damage to their high pressure turbines which was in some respects similar to that found on the Stuyvesant. 752 F.2d at 905, Pet. App. at 4a-5a; Pet. App. at 40a, 41a. The high pressure turbine guide bucket ring of each was in the process of falling apart, and parts of each had passed through the turbines' rotating and stationary parts. JA-15-16, 17, 196-97, 198.

The guide bucket ring of the Brooklyn's high pressure turbine (which had been installed in the Stuyvesant in April 1978) was replaced in June 1978 with a guide bucket ring which had been removed from the Stuyvesant and repaired. Pet. App. at 40a-41a. In August 1978, the Brooklyn received a newly designed guide bucket ring and underwent repairs to its low pressure turbine. 752 F.2d at 905, Pet. App. at 5a; Pet. App. at 41a; JA-199.

The guide bucket ring of the Williamsburgh's high pressure turbine was repaired in the Netherlands in late March and early April 1978. Pet. App. at 41a; JA-16, 197. Other repairs

involving replacement of the Williamsburgh's high pressure turbine guide bucket ring and repair of its low pressure turbine were made during the period from late July to late September 1978. Pet. App. at 41a. During December 1979 and January 1980, the high and low pressure turbines of the Williamsburgh underwent additional repairs in Japan. 752 F.2d at 905, Pet. App. at 5a; Pet App. at 41a; JA-197.

C. The Bay Ridge

The Bay Ridge allegedly sustained damage to its low pressure turbine while en route from New York to Valdez, Alaska on a voyage beginning on February 22, 1980. Pet. App. at 73a, 74a. The turbine damage manifested itself as excessive vibration on March 13, 1980, after the Bay Ridge passed Cape Horn. Pet. App. at 75a; JA-184. The vessel subsequently proceeded to the Port of Talcahuano in Chile for repairs. Pet. App. at 75a. Repairs to the low pressure turbine were accomplished in several days, and the ship resumed its course for Valdez, Alaska. 752 F.2d at 905, Pet. App. at 5a; Pet. App. at 73a; JA-200. The damage to the Bay Ridge's low pressure turbine did not pose a serious risk of harm to persons or other property. Pet. App. at 78a.

The damage to the low pressure turbine was allegedly caused by the installation in reverse of the astern guardian valve, a part of the main propulsion unit supplied by Delaval and installed by Shipbuilding, allegedly under Delaval's supervision. Pet. App. at 74a; JA-181. The damage to the low pressure turbine took place gradually and was occasioned by internal deterioration and breakdown. Pet. App. at 79a.

First, the low pressure turbine blades of the Bay Ridge developed oxidation. JA-186. Next, about March 6, 1980, just before the ship arrived at Rio de Janeiro, Brazil, heating and stretching of the last row blading of the turbine took place and there was rubbing between the turbine casing and blading. JA-186. Parts of the last row blading came off within the turbine and lodged in the intermediate blade ring of the turbine. JA-186. The damage was insufficient to be evident as external vibration. JA-186; Pet. App. at 74a.

After the Bay Ridge left Rio de Janeiro on March 7, 1980, more heating, stretching and rubbing of parts took place; and additional material broke off inside the low pressure turbine. Pet. App. at 74a-75a; JA-186. The Bay Ridge continued on its course from Rio de Janeiro around Cape Horn, until March 13, 1980, when it experienced allegedly unacceptable vibration. Pet. App. at 75a; JA-186-87. The Bay Ridge stopped to review the damage, resumed its course, and then temporarily deviated from its course for repairs in Chile which commenced on or about March 18, 1980. Pet. App. at 73a; JA-200. On March 22, 1980, the repairs in Chile were completed, and the Bay Ridge resumed its course for Valdez, Alaska. Pet. App. at 73a; JA-200.

The problems experienced by all four ships were caused by gradual internal deterioration of the turbines' parts. 752 F.2d at 909, Pet. App. at 12a-13a. The alleged defects manifested themselves over a period of time during normal operation of the turbines. 752 F.2d at 909, Pet. App. at 13a. No injury or risk of injury to persons or property other than the main propulsion units resulted from the alleged malfunctions. 752 F.2d at 905, 909, Pet. App. at 3a, 13a-14a.

II.

Second Amended Complaint

The charterer of each of the four ships asserted a claim against Delaval for defects in the main propulsion unit of the ship it chartered. In the first four counts of the second amended complaint, each charterer seeks to recover in strict tort liability for Delaval's allegedly defective guide bucket ring. 752 F.2d at 905-06, Pet. App. at 5a, 7a. In the fifth count, Richmond seeks to recover in negligence for Delaval's allegedly negligent supervision of the installation of the Bay Ridge's astern guardian valve. 752 F.2d at 906, Pet. App. at 5a. There is no claim in negligence except in the fifth count. Petitioners allege that they suffered loss in the nature of costs of replacement and repair and lost profits from down-time. 752 F.2d at 904-05, Pet. App. at 3a.

The second amended complaint contains no claim for breach of contract or breach of warranty by any of the petitioners. JA-191-207. The second amended complaint was filed after Delaval moved for summary judgment for an order dismissing, among other things, the breach of contract and breach of warranty claims in the amended complaint.[2] All such claims were dismissed with prejudice by the District Court in its order granting leave to file the second amended complaint. JA-214-15. The negligence claims in the amended complaint of East River, Kingsway and Queensway (for Delaval's allegedly defective guide bucket ring) were also deleted from the second amended complaint and dismissed with prejudice by the District Court at the same time. JA-215.

III.

Opinion Of The District Court

On Delaval's motion for summary judgment, the District Court (Meanor, J.) dismissed the first four of the five counts in the second amended complaint, all of which sought recovery in strict tort liability. Pet. App. at 38a. The District Court held that the action was governed by federal maritime law. Pet. App. at 64a. Under federal maritime law, the Court found, there is no recovery in tort for defects in product quality, absent personal injury or damage to property other than the defective product itself or an unreasonable risk of such damage, such as would arise from sudden and calamitous occurrences. Pet. App. at 64a-67a. The District Court upheld the fifth count which sought recovery in negligence on the basis of its erroneous assumption that the astern guardian valve was not part of the main propulsion unit supplied by Delaval. Pet. App. at 70a-71a.

Upon reargument, the Court rendered a supplemental opinion dismissing the fifth count on the grounds that the astern

2 Dismissal of the breach of contract and breach of warranty claims was sought upon the basis of the statute of limitations and contractual provisions limiting petitioners' remedies and disclaiming warranties other than those contained in the contract for the sale of the main propulsion units. JA-38-40.

guardian valve was in fact an integral part of the main propulsion unit and that the fifth count also impermissibly sought recovery in tort for a defect in product quality. Pet. App. at 78a & n.10, 80a-81a. On January 21, 1983, the Court entered judgment dismissing the action with prejudice. Pet. App. at 81a.

Petitioners appealed to the United States Court of Appeals for the Third Circuit. The Court of Appeals directed that the appeal be heard in banc. Pet. App. at 32a.

IV.

Opinion Of The Court Of Appeals In Banc

The Court of Appeals in banc affirmed the judgment of the District Court dismissing this action. The Court held that petitioners had no claims in tort under the prevailing rule that damage due to a defective product is not actionable in tort unless the defective product harms or creates an unreasonable risk of harm to persons or property other than the product itself. 752 F.2d at 908, Pet. App. at 10a.

The Court found that, unlike the "defect in those cases in which tort recovery is allowed for a damaged product," the defect in this case was neither related to the safety of the product nor "associated with calamitous events like fire or sudden collision." 752 F.2d at 909, Pet. App. at 12a. Rather, the defect involved internal deterioration and breakdown of the turbine's parts, which reduced the ship's speed and caused the petitioners losses in the form of down-time for repair and lost profits. 752 F.2d at 909, Pet. App. at 13a. The alleged defect only implicated the "intended performance level" of the turbines and the petitioners' "disappointed expectations in their purchase", 752 F.2d at 909, Pet. App. at 12a, and was redressable only in contract.

Since the Court of Appeals found that petitioners lacked any valid claims in tort, the Court held that the District Court properly granted summary judgment against petitioners dismissing all five counts. 752 F.2d at 910, Pet. App. at 14a.

Petitioners' application for a rehearing by the Court of Appeals was denied. Pet. App. at 35a-36a.

Summary Of Argument

We respectfully submit that the best and prevailing rule which has been adopted as the law in the overwhelming majority of states should be adopted as the rule of law for cases in the federal maritime jurisdiction. That rule denies recovery in tort (strict tort liability or negligence) for claims based upon quality defects rather than safety hazards. Claims based upon quality defects are properly governed by the Uniform Commercial Code rather than tort law. There is no basis for applying different rules in cases of product liability on land and sea.

The Court of Appeals correctly followed the majority common law rule allowing a tort action for a defective product only if the defect harms or creates an unreasonable risk of harm to persons or other property.[3] If, as here, the defective product fails to function as well as expected but is not hazardous, the remedy lies in contract, not in tort. Since petitioners have no valid claims in contract remaining (such claims having previously been dismissed), the judgment of the Court of Appeals dismissing this action should be affirmed.

The rationale for the majority rule hinges on the different purposes of contract and tort law. Protection against the risk of unsatisfactory (but not hazardous) products should be secured by bargaining for a warranty. Alternatively, one may choose to limit or forego warranty protection and purchase a product at a lower price. Subsequent purchasers may also bargain over price and warranty protection. Only damages arising from hazardous product defects are redressable in tort.

The Uniform Commercial Code adequately protects the rights of the parties and contains carefully crafted guidelines governing the statute of limitations, disclaimer of warranties,

3 *See* cases cited at pp. 11-14, *infra*.

and other matters. Where safety is not concerned, tort principles should not interfere with contractual arrangements reached under the Code. This is especially true where, as here, petitioners are large corporations fully able to protect their interests and as able as respondent to spread any costs throughout the market.

The majority rule promotes fairness and predictability in commercial transactions. Manufacturers know that they have a duty to produce a safe product. But the manufacturer's duty to produce a product of a certain quality is governed by the terms of its contract with the purchaser of the product. Under the rule advocated by petitioners, a purchaser could ignore the terms of its contract and receive more than it bargained for, making the manufacturer the guarantor of the performance of its products throughout their reasonably productive lives.

The origin of product liability torts in admiralty further supports incorporation by admiralty of the majority common law rule. Strict tort liability[4] and negligence[5] claims for defective products were incorporated from the common law by admiralty, years after their adoption by common law courts, expressly because of their widespread acceptance on land as part of the common law of torts. It would be anomalous for maritime law not to incorporate the prevailing definitions of such torts as well and instead accept a disfavored view. There is nothing about manufacturers of goods for use at sea which differentiates them from manufacturers of goods for use on land and warrants the application of a different rule.

Petitioners contend that their purported tort claims should be allowed because the damages they seek resemble those that have been awarded for proper maritime torts such as wrongful seizure. But the issue here is not the nature of the damages to

4 *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972); *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977).

5 *Sieracki v. Seas Shipping Co.*, 149 F.2d 98 (3d Cir. 1945), *aff'd on other grounds*, 328 U.S. 85 (1946).

which petitioners may be entitled for proper tort claims, but whether they have stated any proper tort claims to begin with. Since they have not, the damages awarded for proper maritime tort claims are beside the point.

Petitioners contend that, even if the Court of Appeals applied the proper rule of law, it applied the rule incorrectly because it should have found an unreasonable risk of harm to persons or property with reference to the Stuyvesant (first count) and Bay Ridge (fifth count). Petitioners do not contend that the rule was incorrectly applied to any other vessels or claims. As both the Court of Appeals and District Court have held, petitioners offered no proof of a hazardous defect, but only of a product that was of inferior quality.

For the above reasons, petitioners' claims were properly dismissed, and the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

POINT I

UNDER FEDERAL MARITIME LAW, PETITIONERS INVALIDLY SEEK RECOVERY IN TORT FOR A DEFECT IN PRODUCT QUALITY; WHERE, AS HERE, THERE IS NO HARM OR UNREASONABLE RISK OF HARM TO PERSONS OR OTHER PROPERTY, THERE MAY BE NO TORT RECOVERY

A. Under The Best And Prevailing Rule, Claims For A Defect In Product Quality Are Not Cognizable In Tort Absent Harm Or An Unreasonable Risk Of Harm To Persons Or Property Other Than The Product Itself

The opinion of the Court of Appeals follows the majority common law rule as set forth in *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981) (denying recovery in strict tort liability and negligence), which the Court held should be applied under federal maritime law. Where, as here, there is no personal injury or damage to property other than the defective product itself, *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d

280, 284-90 (3d Cir. 1980), there may be no recovery in tort absent an unreasonable risk of harm to persons or other property resulting from sudden and calamitous damage. *Pennsylvania Glass Sand Corp.*, 652 F.2d at 1169-70, 1172, 1174.[6] As the Court of Appeals stated (at 752 F.2d at 908, Pet. App. at 10a):

> [T]he better view, and one in accord with the prevailing view on land, is that damage to a defective product is not actionable in tort unless the design defect creates an unreasonable risk of harm to persons or property other than the product itself.[7]

As the Court of Appeals noted, " '[t]he gist of a products liability tort case is not that the plaintiff failed to receive the quality of product he expected, but that the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or his property.' " 752 F.2d at 908, Pet. App. at 10a (quoting *Pennsylvania Glass Sand Corp.*, 652 F.2d at 1169-70). *Accord*, *Schiavone Construction Co. v. Elgood Mayo Corp.*, 56 N.Y.2d 667, 451 N.Y.S.2d 720, 436 N.E.2d 1322 (1982), *rev'g* 81 A.D.2d 221, 439 N.Y.S.2d 933 (1st Dep't 1981) (for the reasons stated in the dissent in the Appellate Division) (denying recovery in strict tort liability); *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982) (denying recovery in negligence and strict tort liability).[8] Indeed, under Restatement (Second) of Torts

6 Petitioners note (at Pet. Br. 10 n.4) that *Pennsylvania Glass Sand Corp.* expressed an opinion only as to Pennsylvania law. However, the court conducted a scholarly analysis of the law as expressed by numerous state courts and authorities and the policies underlying it and determined that the rule it selected was the soundest before applying it.

7 *See also Maru Shipping Co. v. Burmeister & Wain American Corp.*, 528 F. Supp. 210, 214-15 (S.D.N.Y. 1981) (denying recovery in strict tort liability under federal maritime law); *Anglo Eastern Bulkships Ltd. v. Ameron, Inc.*, 556 F. Supp. 1198, 1204 (S.D.N.Y. 1982) (same); *Rio Pardo Shipping Corp. v. O'Brien Machinery Co.*, Civil Action No. 82-1101 (E.D. Pa. November 1, 1982) (same).

8 *See also Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280 (3d Cir. 1980) (denying recovery in negligence and strict tort liability); *Arrow Leasing Corp. v. Cummins Arizona Diesel, Inc.*, 136 Ariz. 444, 666 P.2d 544 (Ariz. Ct. App. 1983) (denying recovery in negligence); *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983) (denying recovery in negligence and strict tort liability); *Vulcan Materials Co. v. Driltech, Inc.*, 251 Ga. 383, 306 S.E.2d 253 (1983) (denying recovery in negligence); *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 829 (8th Cir. 1983) (same; Missouri law); *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981) (denying recovery in negligence and strict tort liability); *Sanco, Inc. v. Ford Motor Co.*, 771 F.2d 1081 (7th Cir. 1985) (denying recovery in negligence under Indiana law); *Cayuga Harvester, Inc. v. Allis-Chalmers Corp.*, 95 A.D.2d 5, 465 N.Y.S.2d 606 (4th Dep't 1983) (denying recovery in negligence under New York law following reasoning in *Schiavone Construction Company v. Elgood Mayo Corp.*, 56 N.Y.2d 667, 451 N.Y.S.2d 720, 436 N.E.2d 1322 (1982)). *Accord*, proposed Model Uniform Product Liability Act § 102(F), 44 Fed. Reg. 62,714 (October 31, 1979), drafted by the Department of Commerce to "introduce uniformity and stability into the law of product liability," and Senate Commerce Committee Staff Working Draft # 2 of a Bill To Regulate Interstate Commerce By Providing For A Uniform Product Liability Law, And For Other Purposes §§ 102(5), 102(8) & 103 (November 27, 1985).

§ 402A, strict tort liability is premised on the sale of a product in a defective condition which is "unreasonably dangerous to the user or consumer or his property."[9] *See also Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1582 (10th Cir. 1984) (strict tort liability and negligence restricted to dangerously defective products).

Under the majority common law rule applied by the Court of Appeals, where a product fails to meet the purchaser's economic expectations but is not hazardous the remedy lies in contract. *Pennsylvania Glass Sand Corp.*, 652 F.2d at 1169 (contractual rather than tort remedy lies when "an individual wishes a product to perform a certain task in a certain way, or expects or desires a product of a particular quality so that it is fit for ordinary use," and the product does not match his economic expectations). A buyer may reasonably be expected to bear the risk that a product will fall short of his economic expectations, "unless the manufacturer agrees that it will." *Seely v. White Motor Co.*, 63 Cal. 2d 9, 18, 45 Cal. Rptr. 17, 23, 403 P.2d 145, 151 (1965) (Traynor, J.). Thus the buyer's claims for the inferior quality of the product are redressable

9 Restatement (Second) of Torts § 402A has been incorporated by federal maritime law. *Ocean Barge Transport Co. v. Hess Oil Virgin Islands Corp.*, 726 F.2d 121, 123 (3d Cir. 1984).

only in contract, typically under the Uniform Commercial Code. *See Jones & Laughlin Steel Corp.*, 626 F.2d at 288; *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 580-82, 489 A.2d 660, 673-74 (1985) (denying recovery in strict tort liability and negligence for defective trucks).[10]

Claims in contract against Delaval would be governed by the Uniform Commercial Code[11] since they arise from contracts to construct or to supply materials for the construction of a vessel. These are non-maritime claims governed by state law. *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 242, 243 (1920) (contracts to construct ships non-maritime); *CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377, 380 n.4 (2d Cir. 1982); *Owens-Illinois, Inc. v. United States District Court for the Western District of Washington*, 698 F.2d 967, 970 (9th Cir. 1983).[12]

10 *Spring Motors* modified 20 years of New Jersey precedent and held that commercial plaintiffs (such as petitioners) could not recover in strict tort liability or negligence for qualitative (non-hazardous) product defects. The case limited *Santor v. A & M Karagheusian Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), which had long been regarded as the leading exponent of a contrary view, insofar as it would have permitted such recovery in strict tort liability. As Judge Becker (concurring and dissenting) noted in the Court of Appeals (at 752 F.2d at 915 n.5, Pet. App. at 26a n.5), *Santor*'s "expansive approach to products liability in tort unnecessarily infringe[d] freedom of contract."

Petitioners argued in the District Court for the application of the law of New Jersey, where the main propulsion units were built. Pet. App. at 44a. However, in light of *Spring Motors*, petitioners could not recover in tort under the law of New Jersey. Nor could they recover under the law of New York where the ships were built and the main propulsion units installed. *See Schiavone Construction Co. v. Elgood Mayo Corp.*, 56 N.Y.2d 667, 451 N.Y.S.2d 720, 436 N.E.2d 1322 (1982), *rev'g* 81 A.D.2d 221, 439 N.Y.S.2d 933 (1st Dep't 1981) (for the reasons stated in the dissent in the Appellate Division).

The rejection of the long-standing *Santor* rule by the court which had developed it is noteworthy. Thus in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 388 (1970), in fashioning a maritime rule for wrongful death, this Court found it significant that the contrary rule had been rejected "in most of the areas where it once held sway."

11 The Uniform Commercial Code has been adopted in all states (as well as the District of Columbia, the Virgin Islands, and Guam) except for Louisiana, which has adopted selected articles of the Code. 1 Uniform Laws Annotated 1-2 (1985 Supp.).

Petitioners contend (at Pet. Br. 20-21) that the Court of Appeals erroneously relied on *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965) in denying recovery in negligence for qualitative product defects. First, although *Seely* exemplifies the majority rule barring recovery in tort for qualitative product defects, many other courts do so as well. *See, e.g., Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981); *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985). Indeed, the Court of Appeals relied on *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 950 (11th Cir. 1982) and *Jones & Laughlin Steel Corp.*, 626 F.2d at 285-88, for the same point as it cited *Seely*. *See* 752 F.2d at 908 n.2, Pet. App. at 12a n.2. Both cases denied recovery for negligent supervision of the installation of the product concerned, the type of claim made by petitioner Richmond in the fifth count. *See* pp. 39-40, *infra*.[13]

12 Contrary to petitioners' contention (at Pet. Br. 19 n.19), the application of the Uniform Commercial Code to their claims does not subject federal maritime law to state law. Instead, it applies state law to state law claims. Petitioners' attempt to advance their contract claims as tort claims, on the other hand, is an effort to expand the jurisdiction of the maritime law beyond its historical limits.

Moreover, the application of the Uniform Commercial Code to this case is not inconsistent with *Jig The Third Corp. v. Puritan Marine Insurance Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976), as petitioners claim. Pet. Br. 19 n.19. That case involved negligence (a tortious occurrence concerning the sinking of a vessel), not contract. There are no tortious occurrences in this case.

13 Petitioners disagree with *Seely* (at Pet. Br. 17-18) on the basis that manufacturers may foresee potential users of their defective products and therefore it is appropriate to hold them responsible in tort. The issue is rather whether given the nature and purpose of products liability tort law, manufacturers should be responsible in tort as well as contract for the failure of their unsatisfactory (but not hazardous) products to perform as expected.

Second, *Seely* is still good law in California,[14] and was not even mentioned in, much less overruled by, *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60 (1979). *Cf.* Pet. Br. 20. Indeed, *J'Aire* was not a products liability case and did not involve a defective product but was instead a case of negligent performance of a construction contract.[15]

B. Recovery In Tort For Qualitative Product Defects Cannot Be Permitted Without Encroaching Upon And Circumventing The Uniform Commercial Code

The rationale for the majority rule hinges on the different purposes of contract and tort law. Protection against the risk of unsatisfactory (but not hazardous) products may and should be secured by bargaining for a warranty. *Jones & Laughlin Steel Corp.*, 626 F.2d at 288. Alternatively, one may choose to purchase a product at a lower price and forego the protection of a warranty.[16] *Id*; *see Spring Motors*, 489 A.2d at 671 (price

14 *See Sacramento Regional Transit District v. Grumman Flxible*, 158 Cal. App. 3d 289, 204 Cal. Rptr. 736 (1984) (following *Seely*). Other cases cited by petitioners are inapposite. *Pisano v. American Leasing*, 146 Cal. App. 3d 194, 194 Cal. Rptr. 77 (1983), did not involve a qualitative product defect but rather an allegedly defective sander which damaged wooden cabinets. *Huang v. Garner*, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1984), did not involve a defective product. *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984) failed to resolve any substantive issues of California tort law but rather considered the duty of counsel to cite *J'Aire* and other cases.

15 Petitioners' reference (at Pet. Br. 16 n.12) to *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 100 N.J. 246, 495 A.2d 107 (1985), is likewise irrelevant. *People Express* did not involve a defective product but rather the negligent puncturing of a railway tank car, the escape of a flammable gas from the car and, when the gas ignited, a fire. The rule in New Jersey governing liability for the sale of defective products as to commercial entities such as petitioners is set forth in *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), which was not cited in *People Express*.

16 The agreement for the sale of the main propulsion units contained a warranty for a period of six months after installation of each unit or twelve months after its shipment, whichever occurred sooner. The warranty required Delaval to repair or replace equipment which may have been proved defective because of design, material or workmanship, f.o.b. Trenton, New Jersey. JA-39-40, 78-79. The agreement barred liability for consequential or like damages, including loss of revenue or profit, and disclaimed all other warranties, whether express or implied. *Id*.

paid for allegedly defective trucks presumably reflected nature of warranty terms). Similarly, subsequent purchasers may bargain over price and warranty protection.[17] *Jones & Laughlin Steel Corp.*, 626 F.2d at 288; *Moorman Manufacturing Co.*, 435 N.E.2d at 448.

The Uniform Commercial Code provides an adequate set of rights and remedies to resolve the differences among the parties, and the parties are not entitled to supplemental protection by tort principles. *Spring Motors*, 489 A.2d at 673-74. Circumvention of the Code's carefully drafted guidelines governing the statute of limitations, disclaimer of warranties, and other matters should not be permitted.[18]

By seeking to impose the risk of loss on Delaval, petitioners seek "to obtain a better bargain" than they made. *Id*. at 671.

17 *See Marr Enterprises, Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951, 958 (9th Cir. 1977) (bareboat charterer denied recovery against manufacturer of ship's malfunctioning refrigeration system; charterer took no steps to protect himself from defects in system).

18 *Accord, Spring Motors*, 489 A.2d at 671 ("By enacting the U.C.C., the Legislature adopted a carefully-conceived system of rights and remedies to govern commercial transactions. Allowing [plaintiff] to recover . . . under tort principles would dislocate major provisions of the Code. . . . [T]he U.C.C. represents a comprehensive statutory scheme that satisfies the needs of the world of commerce, and courts should pause before extending judicial doctrines that might dislocate the legislative structure."); *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784, 792 (1978) (Uniform Commercial Code contains "comprehensive and finely tuned statutory mechanism" for dealing with the rights of the parties with respect to losses arising from qualitative product defects); *S.M. Wilson & Co. v. Smith International, Inc.*, 587 F.2d 1363, 1376 (9th Cir. 1978) (parties' rights limited to those provided by Uniform Commercial Code, a body of law designed to deal with disputes between buyers and sellers of goods); *Gibson v. Reliable Chevrolet, Inc.*, 608 S.W.2d 471, 474 (Mo. App. 1980) (recovery in tort would "amount to a judicial assumption of legislative prerogatives" and "vitiate statutory rights found in the law of sales and the Uniform Commercial Code"); *Superwood Corp.*, 311 N.W.2d at 162 ("tort theories of recovery would be totally unrestrained by legislative liability limitations, warranty disclaimers and notice provisions"; allowance of tort liability in commercial transactions "would totally emasculate these provisions of the U.C.C."); *Jones & Laughlin Steel Corp.*, 626 F.2d at 289 (recovery in tort would make manufacturer guarantor of performance of its products throughout their reasonably productive lives and supersede provisions of Uniform Commercial Code on limitation of warranties).

See also id. at 671 (allocation of risks in accordance with parties' agreement best serves the public interest). The allocation of the risk of loss will be reflected in the cost of the product, and risks should not be assigned artificially through a non-price mechanism such as tort liability. *Jones & Laughlin Steel Corp.*, 626 F.2d at 288-89; *Moorman Manufacturing Co.*, 435 N.E.2d at 448.

Furthermore, petitioners are sophisticated commercial entities, "large corporations who were fully able to protect their respective interests at the time of the purchase of the turbine." 752 F.2d at 917 n.8, Pet. App. 30a-31a n.8 (Becker, J. concurring and dissenting). Their rights and obligations with respect to the ships are clearly set forth in detailed charters (JA-86, 99, 112, 125), which, among other things, fully set forth the risk of loss for damage to the ships among the owners and charterers. JA-42-43. For instance, the charters require petitioners to maintain and repair the ships and to obtain insurance at their own expense, and if damage renders the vessel unfit for normal use to pay a specified amount of damages to the owner. *Id.*

These facts militate against tort recovery. *See Anglo Eastern Bulkships Limited v. Ameron, Inc.*, 556 F. Supp. 1198, 1204 (S.D.N.Y. 1982) (federal maritime law; doctrine of strict liability in tort designed to aid the injured consumer, not large company); *Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 221 (4th Cir. 1982). Indeed, products liability torts, to the extent they seek to allocate the risk of loss to the party able to spread the cost throughout society, serve no purpose where, as here, the parties are all commercial entities with ability to spread costs. *Spring Motors*, 489 A.2d at 670-71.[19]

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19 *Accord, Scandinavian Airlines System v. United Aircraft Corp.*, 601 F.2d 425, 428 (9th Cir. 1979) (airline had no strict liability claim against engine manufacturer); *Kaiser Steel Corp. v. Westinghouse Electric Corp.*, 55 Cal. App. 3d 737, 748, 127 Cal. Rptr. 838, 845 (1976) (purchaser of electric motor for use in steel mill had no strict liability claim against motor's manufacturer); *General Public Utilities Corp. v. Babcock & Wilcox Co.*, 547 F. Supp. 842, 844 (S.D.N.Y. 1982) (owners of nuclear electric generating facility had no strict tort liability claim against manufacturer of nuclear system).

Petitioners argue that under the majority rule, manufacturers will not know whether they have a duty of care until "after the event complained of" and "only hindsight can determine when liability attaches." Pet. Br. 17, 23. Their argument confuses duty with liability, ignores the contractual arrangements of the parties, and is in any event beside the point.

First, the majority rule imposes on manufacturers the duty to make safe products; thus the suggestion that manufacturers will not be aware of their duty until damage occurs is invalid. Moreover, as formulated by the Court of Appeals, the duty is a broad one. The manufacturer is required to make a product which not only must not injure persons or other property but not create an unreasonable risk of such injury.

Although a manufacturer will not know whether it has breached its duty and will incur liability until after an event causing damage occurs, that is always the case. Until damage is sustained, plaintiff has no claim and a manufacturer cannot be held responsible. *Cf. Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928); *Martin v. Herzog*, 228 N.Y. 164, 170, 126 N.E. 814, 816 (1920).

Second, the majority rule recognizes that the manufacturer has contractual duties; and the responsibility for the design of unsatisfactory (but not unsafe) products is allocated according to the terms of the contracts of the parties. Thus the majority rule, by respecting the contracts of the parties, enhances the parties' ability to predict their rights and obligations. The rule espoused by petitioners, which would supersede their contractual arrangements, does not.

Petitioners say that the majority rule leaves parties without a remedy. Pet. Br. 16. This is untrue. The majority rule relegates their claims to contract law; it does not extinguish them. As Judge Garth (concurring) stated in the Court of Appeals (at 752 F.2d at 911, Pet. App. at 18a), petitioners should "be remitted to whatever contract remedies, if any, remain to them under the applicable agreements."

C. Petitioners' Tort Claims Are Of Recent Origin, Having Been Incorporated By Federal Maritime Law Because Of Their Widespread Acceptance By The States; The Prevailing Rules Governing Such Claims Should Apply To Them As Well

Consideration of the origins of maritime products liability likewise supports the judgment of the Court of Appeals. Products liability developed on land and was incorporated into federal maritime law by courts of appeals because of its acceptance by state courts to such a widespread extent that it was part of the general law of torts. The same standard should be applied in determining the content of products liability under federal maritime law, and applying that standard the judgment of the Court of Appeals should be affirmed.

Strict tort liability was imported into federal maritime law in the 1970's because it was "sufficiently well-established [in the common law] to justify being incorporated into the law of admiralty." *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129, 1134-35 (9th Cir. 1977) (defective fuel filter leads to fire on and sinking of vessel); *accord*, *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 636-37 (8th Cir. 1972) (defect in airplane leads to fire, crash, and death of pilot). The widespread recognition of this cause of action on land was the basis for its incorporation.

The doctrine of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), permitting recovery in negligence for allegedly defective products in the absence of privity, upon the basis of which Richmond seeks recovery on the fifth count, reached the law of admiralty in the 1940's through *Sieracki v. Seas Shipping Co.*, 149 F.2d 98, 99-100 (3d Cir. 1945), *aff'd on other grounds*, 328 U.S. 85 (1946) (principles in *MacPherson v. Buick Motor Co.* "so widely accepted as to be construed as a part of the general law of torts, maritime as well as common law"); *accord*, *Whorton v. T.A. Loving and Co.*, 344 F.2d 739, 743-44 (4th Cir. 1965). Likewise this doctrine was accepted in federal maritime law because of its general acceptance in the common law.

There is no basis in the genesis of products liability law in admiralty for the acceptance of a minority, disfavored rule. Such acceptance would be at odds with the reasons for incorporating such law in the first place. Indeed, since petitioners' strict liability and negligence claims were brought into admiralty only because they were widespread on land, it would be anomalous (as the District Court noted at Pet. App. at 58a-59a) for the prevailing definition of such claims not to be incorporated as well. A contrary rule would eliminate the basis for their initial incorporation (*viz.*, their widespread acceptance); deprive them of the rationale for their continued existence; and incorporate a rule which has been repudiated on land in products liability cases.[20]

The history of maritime products liability also shows that petitioners' reference (at Pet. Br. 13-14) to *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824), and *The Conqueror*, 166 U.S. 110 (1897), is misplaced. To begin with, neither case involved a defective product; neither permitted recovery for the negligence and strict tort liability claims made by petitioners; and both courts, had they been required to rule on them, would have dismissed such claims, as would common law courts at the time. *See* p. 20, *supra*. Indeed, in matters of products liability, admiralty law lagged behind, and then followed the lead of, common law courts where expertise in these matters developed.

Petitioners' reference to *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), is beside the point. Pet. Br. 9. In *Kermarec*, the Court declined to adopt a distinction in the duty of care owed a licensee as opposed to an invitee (concepts rooted in feudalism) where the common law trend was against such a distinction. *See* 358 U.S. at 630-631. Similarly, in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409

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20 Although petitioners indicate that the "importation of state law into admiralty is inappropriate," Pet. Br. 10, the law upon which petitioners base their claims itself was imported from the common law. Indeed, federal maritime law often looks to the prevailing rule on land, absent a maritime rule on point. *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, 259 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

(1953), the Court held that admiralty law would decline to adopt a "discredited doctrine" barring recovery where there is contributory negligence. The majority rule applied by the Court of Appeals, in contrast, is not a product of an antiquated legal system, but the modern law of products liability.[21]

Petitioners imply (at Pet. Br. 9-10) that *Kermarec* demonstrates a reluctance of admiralty law to apply distinctions in general and an affinity for simple and practical rules. To begin with, there is no basis to contend that the majority common law rule applied by the Court of Appeals is either needlessly complicated or impractical.[22] Moreover, the appropriate rule is the fairer rule which properly recognizes the distinct interests protected by contract and tort law. The rule applied by the Court of Appeals does this; the rule espoused by petitioners does not.

Furthermore, *Kermarec* objected to antiquated, disfavored distinctions against which the common law itself was turning, not distinctions in general. Also, *Kermarec* did not demonstrate any peculiar predilection of admiralty for simple rules. Indeed, in *Pope & Talbot, Inc., supra*, this Court rejected the simple rule barring recovery in personal injury cases where there was contributory negligence in favor of comparative negligence. *See also United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975) (rejecting rule of divided damages in maritime collision or stranding cases in favor of comparative negligence).

Petitioners irrelevantly dwell (at Pet. Br. 13-14) on the alleged resemblance between the items of damages recovered

21 Petitioners' reference (at Pet. Br. 24 n.23) to the Limitation of Liability Act, 46 U.S.C. § 183, is irrelevant. The statute concerns the amount of recovery permissible against certain shipping interests, not the types of claims which they may assert. The quotation cited by petitioners concerns the statute's interpretation and likewise has no bearing on this matter.

22 Petitioners suggest that a simpler rule would not require an unreasonable risk of harm and therefore necessarily would allow their recovery. That is not the case. Some courts have denied tort recovery despite such a risk. *See S.J. Groves and Sons v. Aerospatiale Helicopter Corp.*, 374 N.W.2d 431 (Minn. 1985); *Mid-Continent Aircraft Corp. v. Curry County Spraying Service*, 572 S.W.2d 308 (Tex. 1978).

for maritime torts, such as wrongful seizure, and those they seek to recover here. *See The Conqueror*, 166 U.S. 110 (1897) (wrongful seizure); *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824) (wrongful seizure). First, the resemblance does not entitle petitioners to recover in tort. *Pennsylvania Glass Sand Corp.*, 652 F.2d at 1174 (items of damages sought to be recovered not "determinative of the line between tort and contract").[23] Indeed, as the Court of Appeals held, the focus of the inquiry is not the type of damages claimed, but whether there is a tort claim stated at all:

> [The] question . . . is not what losses can be recovered once an act has been characterized as a tort, but whether under the modern law of products liability, as it has been imported into the law of admiralty, a products liability complaint that seeks recovery for damage to a product caused by a design defect states a cause of action in tort.[24]

752 F.2d at 907-08, Pet. App. at 10a.[25]

23 Some courts have phrased the rule prohibiting recovery in tort for damages arising from qualitative product defects as the "economic loss" rule. Economic loss is "the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." *Pennsylvania Glass Sand Corp.*, 652 F.2d at 1169. Damages claimed in such cases involve amounts for reduction in value, repair or replacement, and lost profits. *Id. Cf. Daitom, Inc.*, 741 F.2d at 1581-82 ("economic loss" is not an appropriate name for the rule it describes).

24 Despite petitioners' assertion (at Pet. Br. 13-14), *The Apollon* and *The Conqueror* did not "marry" contract and tort law. The cases considered the damages available for a proper maritime tort. Because petitioners have no valid tort claims, the question of damages is not before this Court.

25 The Court of Appeals correctly rejected petitioners' contention that admiralty was more hospitable to tort recoveries than the common law, noting (at 752 F.2d at 907, Pet. App. at 9a) that "the traditional tort policy of full compensation is enforced in admiralty, as it is on land." *Compare, e.g.*, Restatement (Second) of Torts § 928 *with, e.g.*, G. Robinson, Handbook of Admiralty Law in the United States § 114 at 848 & n.141 (1939). *See also O'Brien Bros. v. The Helen B. Moran*, 160 F.2d 502, 505 (2d Cir. 1947) (same rule of damages applied to ships and automobiles damaged by

Second, claims of wrongful seizure are valid tort claims. Petitioners have not stated valid tort claims but only the failure of a product to perform as expected, without an unreasonable risk of harm to persons or other property.

D. The Cases Cited By Petitioners Should Not Permit Recovery

Petitioners rely on *Emerson G.M. Diesel, Inc. v. Alaskan Enterprise*, 732 F.2d 1468 (9th Cir. 1984), the sole United States Court of Appeals opinion to permit recovery in strict tort liability for defects in product quality under federal maritime law.[26] *Emerson* purports to reject the majority rule, which it concedes would relegate recovery to the law of warranty. 732 F.2d at 1473.

Emerson, which involved a claim in strict tort liability by a fishing vessel owner, based its rejection of the majority rule on invalid criticisms of the rule. To begin with, *Emerson* does not properly state the majority rule as applied by the Third Circuit. As the Third Circuit recognizes, unlike *Emerson*, the majority rule allows recovery where a product defect results in an unreasonable risk of harm to persons or other property, not only where it results in damage to persons or other property. *Cf. Emerson*, 732 F.2d at 1472, 1474.

In contending that the majority rule is riddled with exceptions and arbitrary because tort recovery may be permitted only where there is personal injury or property damage (732 F.2d at 1474), *Emerson* misses the point. This is not an arbitrary exception to the majority rule but a recognition of the different interests protected by contract (benefit of the bargain) and tort (safety). Where there is personal injury, damage to other property, or an unreasonable risk of either, safety interests are implicated.

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collision). The issue is beside the point, however; petitioners have no tort claims, and the question of damages need not be reached. 752 F.2d at 907-908, Pet. App. at 10a.

26 The cases primarily relied upon by petitioners, with the exception of *Emerson*, involve negligence, not strict tort liability. *See* Pet. Br. 15-22.

Emerson's statement that manufacturers can insure against the risk of loss and spread the costs to their customers (732 F.2d at 1474 & n.8) is also beside the point. If safety is not an issue, tort law should not override the terms of the parties' bargain concerning the allocation of risk of loss. This is particularly appropriate in the case of commercial entities, such as petitioners, who are capable of spreading the costs as well.

Petitioners contend that the majority rule does not encourage the manufacture of safe products and that *Emerson* does. Pet. Br. 26. *Emerson* imposes no more of a duty to manufacture safe products than the majority rule does. The majority rule and *Emerson* differ in that *Emerson* permits recovery in strict tort liability for safe but unsatisfactory products, and the majority rule does not. Allowing recovery for safe products as *Emerson* does has nothing to do with promoting safety.

Finally, *Emerson* disregarded the fact that the Uniform Commercial Code provides a carefully-conceived system of rights and remedies governing commercial transactions. *Spring Motors*, 489 A.2d at 671. In electing to permit recovery in strict tort liability despite the Code, *Emerson* noted that recovery was not sufficiently available under the Code and adverted to authority permitting claims for the losses of fishermen. 732 F.2d at 1474 n.7. The fishermen's rule is inapplicable here, *see* pp. 27-28, *infra*, and there is no reason to disregard the Code on the basis that its well-reasoned rules will, under appropriate circumstances, defeat recovery.

Ingram River Equipment, Inc. v. Pott Industries, Inc., 756 F.2d 649 (8th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3092 (July 5, 1985) (No. 85-12), permitting recovery in negligence, indicated that recovery in strict tort liability for defects in product quality may be barred under federal maritime law, *see* 756 F.2d at 653 (recovery may not be allowed where the alleged defect did not result "from any lack of due care"), and thus is consistent with *East River* insofar as strict tort liability is concerned. Indeed, the district court in *Ingram River*, 573 F.

Supp. 896, 901-02 (E.D. Mo. 1983), *aff'd*, 756 F.2d 649 (8th Cir. 1985), held that such recovery should be denied.

Insofar as its negligence holding is concerned, *Ingram River*, in describing the result it reached as just, disregarded the fact that the majority rule does not deny recovery but relegates it to contract law. *See* 756 F.2d at 653. Far from being unjust, the majority rule appropriately leaves the risk of loss from an unsatisfactory (but not hazardous) product where it has been placed by the contractual arrangements of the parties. Such an allocation of risk is reflected in the price of the product. *See* pp. 16-18, *supra*. Thus *Ingram River*, like *Emerson*, encroaches upon and circumvents contract law.

Both *Ingram River* and *Emerson* also fail to analyze the historical development of products liability law in admiralty and the policy reasons behind it. Both strict tort liability and negligence were incorporated from the common law on the basis that they were so widely adopted there as to become part of the general law of torts. *See* p. 20, *supra*. In neither *Ingram River* nor *Emerson* was there any recognition that it would be anomalous to incorporate the most modern doctrines of products liability into admiralty law from the common law without adopting the best and prevailing common law rule. Under that rule, as we have shown, the plaintiffs in *Emerson* and *Ingram River* would not be entitled to recover in tort.

Jig The Third Corp. v. Puritan Marine Insurance Underwriters Corp., 519 F.2d 171 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976) (recovery allowed in negligence where shrimp boat sinks at sea because of defective shaft assembly), is inapposite. *Jig The Third* involved a calamitous event (a sinking ship) and damage to property other than the defective product. In *Jig The Third*, the issue of recovery in tort for non-hazardous product defects was not before the court.[27]

27 Petitioners cite to a quotation in *Jig the Third* from W. Prosser, The Law of Torts § 101 (4th ed. 1971). Pet. Br. 22. Contrary to petitioners' implication, Prosser noted that there may be an action in negligence for damages to a defective product itself only arising under calamitous circumstances. *Id.* There are no such circumstances here.

In *Miller Industries, Inc. v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984), the issue involved a negligent failure to warn rather than a claim based upon a design defect as petitioners allege here. Indeed, the court noted that a duty to warn does not go to "the quality of the product that the buyer expects from the bargain, but to the type of conduct which tort law governs as a matter of social and public policy." 733 F.2d at 818.

That *Emerson*, *Miller Industries*, *Jig The Third*, and other cases cited by petitioners involve fishing vessels likewise distinguishes them.[28] As the District Court recognized, suits for lost profits by fishermen and fishing vessel owners are "ultimately irrelevant" to cases not involving fishermen because of the "special solicitude the admiralty law has for protecting the lost profits of fishing vessel owners and fishermen." Pet. App. at 65a.

Because of their special solicitude for the fragile livelihood of fishermen, whose wages consist of a share of the catch, both Congress and the courts have modified the common law in other respects to furnish fishermen with special protection. *See Carbone v. Ursich*, 209 F.2d 178, 182 (9th Cir. 1953) (fishermen are beneficiaries under a "special rule which ma[k]e[s] the wrongdoer liable . . . for the losses of the fishermen"); *Jones*

28 Other cases cited by petitioners as permitting recovery for qualitative product defects in tort also involve the fishing industry. *See Miller Industries, Inc. v. Caterpillar Tractor Co.*, 473 F. Supp. 1147 (S.D. Ala. 1979), *vacated*, 516 F. Supp. 84 (S.D. Ala. 1980) (lost fishing profits; same case as *Miller Industries*, 733 F.2d 813 (11th Cir. 1984), although referred to separately by petitioners); *Laurentine, Inc. v. General Motors Corp.*, 1980 A.M.C. 715 (S.D. Ala.) (fishing vessel; decided by same judge as decided *Miller Industries, Inc., v. Caterpillar Tractor Co.*, 473 F. Supp. 1147 (S.D. Ala. 1979)); *Berg v. General Motors Corp.*, 87 Wash. 2d 584, 555 P.2d 818 (1976) (negligence action by commercial fisherman). *See also Clark v. International Harvester Co.*, 581 P.2d at 793 (noting that *Berg* permitted recovery because it involved a malfunction of a commercial fishing vessel). *Vessel Management, Inc. v. Caterpillar Tractor Co.*, Civil Action No. 80-110-NN (E.D. Va. Jan. 4, 1982), *aff'd*, No. 82-1160 (4th Cir. Feb. 14, 1983), not only involved a negligence action for damage to a fishing vessel, but involved a sudden and dangerous occurrence: an engine explosion arising from a defective engine governor.

v. Bender Welding & Machine Works, Inc., 581 F.2d 1331, 1337 (9th Cir. 1978) ("fishing vessel owners and commercial fishermen may recover for lost fishing profits"); *Rodriques v. Campbell Industries*, 87 Cal. App. 3d 494, 499-500, 151 Cal. Rptr. 90, 92 (1978) (following *Carbone*); *see also* 46 U.S.C. § 533 (fishermen entitled to bring an action against fishing vessel for share of catch). The viability of the special rule protecting fishermen is not at issue here, where petitioners are charterers of oceangoing oil tankers.[29]

Other cases cited by petitioners are irrelevant because they do not involve product defects, let alone qualitative product defects. For instance, *Compania Pelineon de Navegacion, S.A. v. Texas Petroleum Co.*, 540 F.2d 53 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), involved the negligence of defendant's employees in berthing a ship (such that its propeller became fouled and resulted in physical damage to the ship). *National Steel Corp v. Great Lakes Towing Co.*, 574 F.2d 339 (6th Cir. 1978), concerned a collision involving a towing vessel and a railroad bridge.

Todd Shipyards Corp. v. Turbine Service, Inc., 674 F.2d 401 (5th Cir.), *cert. denied*, 459 U.S. 1036 (1982), involved breach of a contract to perform vessel repairs. The issue of recovery in tort for defects in product quality was not raised.[30]

Prudential Lines, Inc. v. Avondale Shipyards, Inc., 1984 A.M.C. 2036 (S.D.N.Y. 1983), which petitioners also cite, indicated that recovery in strict tort liability for qualitative product defects may be barred under federal maritime law and thus is consistent with *East River* on that point. 1984 A.M.C. at 2038. Indeed, the same court so held in *Maru Shipping Co.*

29 The types of losses recoverable by fishermen or other persons in particular cases are in any event irrelevant. As noted above, the inquiry here is whether petitioners have a valid tort claim, not what damages may be recovered if they had such a claim. Since petitioners do not have a valid claim, the issue of what may be recovered is not before the Court.

30 Petitioners neglect to mention that there was no recovery in *Todd* for the episode to which they refer at Pet. Br. 22. *See* 674 F.2d at 405. Nor did petitioners demonstrate a seizure and stopping of turbines as occurred in *Todd*.

v. Burmeister & Wain American Corp., 528 F. Supp. 210, 214-15 (S.D.N.Y. 1981) and *Anglo Eastern Bulkships Ltd. v. Ameron, Inc.*, 556 F. Supp. 1198, 1204 (S.D.N.Y. 1982). Although permitting recovery in negligence, *Prudential* relied on inapposite cases which either did not involve defective products or which involved damages not restricted to the defective product itself.

Thus in determining the content of strict tort liability and negligence claims, the Court of Appeals properly looked to the law of the land, the source of these claims. A different rule of recovery in product liability cases cannot logically be applied to product defects occurring on land (where products liability has developed) and on sea. As the Court of Appeals noted (at 752 F.2d at 908, Pet. App. at 11a), regardless of whether the product is a defective automobile engine or ship engine, tort recovery, absent a hazardous defect, is unwarranted:

> The charterers have not offered, and we do not discern, any persuasive difference between an action which seeks recovery for a defective ship engine and an action which seeks recovery for a defective car engine. In both cases, the law seeks to leave the parties to their bargain, while at the same time protecting consumers of both ships and cars from hazardous defects in the engines.

POINT II

THIS ACTION INVOLVES MAIN PROPULSION UNITS WHICH ALLEGEDLY FAILED TO MEET PETITIONERS' EXPECTATIONS AND DETERIORATED; THERE WAS NO VIOLENT CRASH, FIRE OR EXPLOSION. ACCORDINGLY, THERE SHOULD BE NO RECOVERY IN TORT

The Court of Appeals analyzed the pleadings, depositions, and answers to interrogatories submitted to it on the motion for summary judgment and found that petitioners seek to recover in tort for defects in quality absent harm or an

unreasonable risk of harm to persons or property other than the main propulsion units themselves.[31] The Court of Appeals therefore properly held that none of petitioners' claims is cognizable in tort.

Petitioners contend that even if the Court of Appeals applied the proper rule of law, the Court applied it incorrectly to the facts relating to the first count regarding the Stuyvesant and the fifth count regarding the Bay Ridge. Petitioners claim they are entitled to recover because of an unreasonable risk of harm to persons or property shown in connection with both counts. Not only is petitioners' contention not properly before this Court[32] but it is invalid. As the District Court and Court of Appeals have found, petitioners have failed to show an unreasonable risk of harm on these or any other claims.

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31 Petitioners erroneously state that summary judgment was granted by the District Court upon the basis of an attorney's affidavit. Pet. Br. 25. On the contrary, the District Court granted summary judgment based upon pleadings, depositions, interrogatory answers, and other appropriate proof, all of which was properly introduced. Fed. R. Civ. P. 56(c). Not only was Delaval's proof proper, but petitioners did not object to it. *See Lacey v. Lumber Mutual Fire Insurance Co.*, 554 F.2d 1204, 1205 (1st Cir. 1977) (objections thus waived); *Auto Drive-Away Co. v. ICC*, 360 F.2d 446, 448-9 (5th Cir. 1966) (same).

32 In their questions presented in their petition for a writ of certiorari and brief, petitioners do not raise the issue of whether the Court of Appeals properly concluded that there was no unreasonable risk of harm to persons or property. Rather, they assume there was no such risk and contest the standard applied by the Court of Appeals under those circumstances. Petitioners' argument in the body of their brief that there was an unreasonable risk of harm should therefore be ignored. *See American National Bank and Trust Co. v. Haroco, Inc.*, 105 S. Ct. 3291, 3292 (1985). Moreover, since both the Court of Appeals and the District Court found that petitioners failed to show an unreasonable risk of harm, it is inappropriate for petitioners to contest this now. *Cf. Graver Tank & Manufacturing Co. v. Linde Air Products*, 336 U.S. 271, 275 (1949).

A. The Stuyvesant Claim, Concerning An Allegedly Inferior Product Which Performed Poorly And Deteriorated, Is Not Cognizable In Tort; As The Court Of Appeals And District Court Found, Any Conceivable Claim of Peril Is Contradicted By The Stuyvesant's Continuing Its Voyage For Seven Weeks Over Thousands Of Miles Before Repairs Were Made

Queensway alleges that the Stuyvesant's high pressure turbine malfunctioned and prevented the Stuyvesant from attaining its normal operating speed. JA-194; Pet. App. at 40a. Thus Queensway alleges an inferior product which did not adequately perform its intended function, an allegation which is not cognizable in tort. Pet. App. at 69a-70a; *Pennsylvania Glass Sand Corp., supra.*

The defect "involved gradual deterioration of the turbine's inner mechanisms" and "did not pose a risk of sudden or calamitous injury to persons or property." 752 F.2d at 909, Pet. App. at 13a. Indeed, the Stuyvesant's high pressure turbine functioned well enough to permit it to continue on its voyage for seven weeks, during which it travelled thousands of miles from Alaska to Panama to unload its cargo and then proceeded substantial additional miles from Panama to San Francisco for repairs. Pet. App. at 69a. The high pressure turbine allegedly deteriorated under such use at sea. JA-193-94. This is not sudden destruction or calamity.

The alleged malfunction was not dangerous. *Cf. Pennsylvania Glass Sand Corp., supra* (obvious safety defect of a front-end loader without a fire suppression system, which was consumed by a sudden fire). There are no allegations that the turbine was consumed by fire or exploded or that the ship crashed or collided. *Cf. Pennsylvania Glass Sand Corp.*, 652 F.2d at 1174. Queensway concedes that damage was limited to the turbine itself. JA-210, 212. Since the high pressure turbine

continued functioning long after the alleged problem occurred, no such allegations could be validly made.[33]

Queensway's unsworn allegations of supposed danger (which did not materialize in any event) are belied by the Stuyvesant's conduct following the alleged casualty.[34] Since the Stuyvesant itself did not perceive a substantial peril, as both the Court of Appeals and District Court have held, Queensway's claims of danger are without substance. *See Crowell Corp. v. Topkis Construction Co.*, 280 A.2d 730, 731 (Del. Super. 1971) (plaintiffs used allegedly dangerous building for four years before deciding that the condition was so dangerous it needed prompt correction; court concluded loss did not result from a dangerous condition and denied recovery in tort).

Thus Queensway does not allege that the ship was evacuated, that it made an emergency stop, or that any other extraordinary measure was instituted in response to this "danger". JA-191, 193-94. Instead, as the Court of Appeals noted, the ship "did successfully travel against the storm, and in fact proceeded to Panama, a voyage of some seven weeks. Indeed, after unloading its cargo at Panama, the ship proceeded to San Francisco, where the turbine was examined for problems." 752 F.2d at 909-10 n.3, Pet. App. 14a n.3. Thus, quoting the District Court, the Court of Appeals stated that " 'any nascent allegations of acute peril to the ship or crew resulting from the turbine defect are belied by the course of action undertaken after the defect manifested itself.' " 752 F.2d at 910 n.3, Pet. App. at 14a n.3; Pet. App. at 69a.[35]

Nor does the alleged steam leak on the Stuyvesant permit recovery in tort. The District Court noted that this problem antedated and was corrected before the onset of turbine problems encountered after leaving Valdez; appellants failed to allege any relationship between the steam release and the alleged turbine problems; and no damage whatsoever resulted from the escaping steam. Pet. App. at 69a.

Queensway's claim to recover in tort for the repairs of the Stuyvesant in April or August 1978 (JA-195-96) is also without merit. None of the alleged damages affected the Stuyvesant's functioning or endangered persons or other property. The April 1978 damage was discovered only upon inspection (JA-195); and the August 1978 damage did not even entail a nonfunctioning product, but rather a replacement of a product with another of a different design. JA-195-96. There may be no recovery in tort for such claims.

As the Court of Appeals noted (at 752 F.2d at 909, Pet. App. at 12a), tort recovery has been permitted in cases in which violent crashes, fires, explosions or other such mishaps actually occurred and thus where the potential for physical harm beyond the product itself was most likely, an entirely different type of case than that before this Court:

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33 Petitioners speculate (at Pet. Br. 15-16) on the effect of nominal damage to property other than the main propulsion unit or minor personal injury (none of which occurred) on their recovery. First, petitioners overlook the Court of Appeals' holding that an unreasonable risk of harm is sufficient to permit recovery in tort. Second, although this issue is not before the Court since there was no such damage, courts have held that nominal damage to other property alone will not permit tort recovery. *Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects, Inc.*, 354 N.W.2d 816, 820 n.4 (Minn. 1984); *Northern States Power Co. v. International Telephone and Telegraph Corp.*, 550 F. Supp. 108, 111 (D. Minn. 1982).

34 Petitioners predicate allegations of danger on the unsworn purported letter of the Stuyvesant's master. JA-166-67. First, the letter demonstrates that the Stuyvesant surmounted its alleged turbine difficulties and proceeded on its voyage safely. Second, such an unsworn statement should not be considered on a motion for summary judgment. Fed. R. Civ. P. 56(c); *Edward B. Marks Music Corp. v. Stasny Music Corp.*, 1 F.R.D. 720, 721 (S.D.N.Y. 1941) (Fed. R. Civ. P. 56 requires that facts be contained in affidavits; letters as such are not proper); *accord, Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1300 (D. Del. 1970).

35 Danger of further damage or unreasonable risk of harm to the product sold itself does not sound in tort. The danger must be to persons or other property. *See Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 330 n.12 (Alaska 1981). No such danger is shown here.

> Unlike the defect in those cases in which tort recovery is allowed for a damaged product, the defect in this case is not intimately related to the safety of the product, nor is it associated with calamitous events like fire or sudden collision.[36]

The courts do not and should not tolerate the fertile speculations of plaintiffs to conjure up dangerousness, where the requisite violent crash, fire, explosion or the like do not occur.[37]

Indeed, the courts do not permit recovery where an unsubstantiated claim of dangerousness is made. Pet. App. at 68a & n.14; *J.P. Miller Artesian Well Co. v. Whittaker Corp.*, No. 81 C 5443 (N.D. Ill. Sept. 16, 1982) (neither affidavits nor undisputed facts supported allegations of dangerousness; summary judgment granted); *Moorman Manufacturing Co.*, 435 N.E.2d at 449, 450 (rejecting allegations of dangerousness). Such a claim could be made in almost every case. *See Jamieson v. Woodward & Lothrop*, 247 F.2d 23, 26 (D.C. Cir.), *cert. denied*, 355 U.S. 855 (1957) (almost any product has the

36 *See Cloud v. Kit Manufacturing Co.*, 563 P.2d 248 (Alaska 1977) (carpet padding ignited, mobile home caught fire, and home was severely burned); *Cornell Drilling Co. v. Ford Motor Co.*, 241 Pa. Super. 129, 359 A.2d 822 (1976) (truck caught fire); *MacDougall v. Ford Motor Co.*, 214 Pa. Super. 384, 257 A.2d 676 (1969) (steering mechanism failure resulted in accident; car rolled over); *Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*, 499 F.2d 146 (3d Cir. 1974) (helicopter crash). *But see S.J. Groves and Sons v. Aerospatiale Helicopter Corp.*, 374 N.W.2d 431 (Minn. 1985) (helicopter crash; recovery in tort for damage to the product itself denied); *Mid-Continent Aircraft Corp. v. Curry County Spraying Service Inc.*, 572 S.W.2d 308 (Tex. 1978) (airplane crash; recovery in tort denied).

37 Petitioners mention (at Pet. Br. 26-27) the possibility of an oil spill and its potential effect on the environment. Nothing, not even an unsworn inadmissible document, supports this conjecture; there is no mention of this anywhere in the record; and such concerns have no connection to this case. *In re Oil Spill by the "Amoco Cadiz"*, 659 F.2d 789 (7th Cir. 1981); *In re Oil Spill by the "Amoco Cadiz"*, 1984 A.M.C. 2123 (N.D. Ill. 1984), cited by petitioners, is beside the point. That case did not involve a qualitative product defect but rather a calamitous event: *i.e.*, the destruction of a ship caused by the failure of its hydraulic steering gear.

potential to be dangerous to persons or property, no matter how innocuous, including a lead pencil, a rug, and a rubber band). Permitting tort recovery whenever plaintiffs claimed that a product was potentially dangerous would emasculate contract law, leaving no room for qualitative defects.

Thus, despite contentions that defects were potentially dangerous, recovery in tort has been denied. *See County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 62-63 (2d Cir. 1984) (recovery in negligence and strict tort liability denied despite allegation that defectively designed and constructed nuclear power plant could cause future injury on a grand scale); *Bright v. Goodyear Tire & Rubber Co.*, 463 F.2d 240 (9th Cir. 1972) (no recovery in tort for defective tires even though fearing for his safety, plaintiff replaced them before an accident occurred).[38] Similarly, defects in a number of cases have been characterized as qualitative, although they potentially could have endangered persons or property.[39]

The same rule applies to engine defects as to other product defects. Even where engines have failed, courts have refused to allow tort recovery solely because the defect hypothetically could have endangered persons or property; the alleged peril is too speculative to permit tort recovery. *See Trans World Airlines, Inc. v. Curtiss-Wright Corp.*, 1 Misc. 2d 477, 481-82, 148

38 *See also State of Arizona v. Cook Paint and Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977) (flammable polyurethane foam insulation allegedly caused extreme danger to the buildings and structures, necessitating dismantling of the walls and replacement of the insulation); *Inglis v. American Motors Corp.*, 3 Ohio St.2d 132, 209 N.E.2d 583 (1965) (Rambler automobile allegedly had defective motor, steering, transmission; loose parts fell out from time to time, endangering occupants).

39 *See Jones & Laughlin Steel Corp.*, 626 F.2d at 282 (portions of roof buckled and tore away, presumably posing danger to passersby and workers; cracks permitted water to enter, damaging products and causing electrical outages); *Long v. Jim Letts Oldsmobile, Inc.*, 135 Ga. App. 293, 217 S.E.2d 602, 603 (1975) (automobile engine was "running hot and blowing out liquid in the radiator").

N.Y.S.2d 284, 290 (Sup. Ct. 1955), *aff'd*, 2 A.D.2d 666, 153 N.Y.S.2d 546 (1st Dep't 1956) (defective aircraft engines sometimes malfunctioned while in service; recovery in negligence denied since the danger was averted); *Northern Power & Engineering Corp.*, 623 P.2d at 329 nn.11 & 12 (generator engine shutdown and internal disintegration; claim of potential fire is too speculative).[40]

Accordingly, the dismissal of the first count, pertaining to the Stuyvesant, should be affirmed.

B. The Williamsburgh And Brooklyn Claims Concern The Deterioration Of Turbines Of Ships Which Never Manifested Any Difficulties; No Allegations Of Any Danger Are Made Concerning These Ships

Petitioners concede that under the majority rule applied by the Court of Appeals East River and Kingsway have no basis for asserting claims in tort concerning the Brooklyn (third count) and the Williamsburgh (second count). *See* Pet. Br. 24. As the District Court stated (Pet. App. at 68a): "With regard to the Brooklyn and Williamsburgh, it is clear that the turbines on these two ships never evinced *any* signs of malfunctioning while in use, let alone precipitate any violent or hazardous incident of the sort relied upon by *PGS* [*i.e.*, *Pennsylvania Glass Sand Corp.*, *supra*] in finding tort liability. Only because of the problems encountered with the Stuyvesant were these two ships inspected for defects at all." (Emphasis in original). Damage to the ships' turbines "was not discovered until the ships were in port." 752 F.2d at 906, Pet. App. at 7a.

40 *See also Mid-Hudson Mack, Inc. v. Dutchess Quarry & Supply Co.*, 99 A.D.2d 751, 471 N.Y.S.2d 664 (2d Dep't 1984) (defective oil pump causes engine failures in trucks; recovery in negligence and strict tort liability denied where no accident occurred); *Gibson v. Reliable Chevrolet, Inc.*, 608 S.W.2d 471, 474 (Mo. App. 1980) (while in use, engine heating core ruptured, creating excessive heat and destroying motor; court rejected claim of threatened bodily harm or damage to other property and denied recovery in strict tort liability).

Thus East River and Kingsway allege that upon inspection parts of the Williamsburgh and the Brooklyn high pressure turbines were found to be in the "process of falling apart" and "disintegrating." JA-196-98. The damage to these turbines is allegedly to a "varying degree" the same as that sustained by the Stuyvesant's high pressure turbine. JA-197-98. As the District Court stated (Pet. App. at 68a), such "internal turbine problems of gradual breakage . . . [fall] within the category of economic loss recoverable solely in contract." (Footnote omitted).

The dismissal of the second and third counts should be affirmed.

C. The Low Pressure Turbine Claims Concerning The Stuyvesant, Williamsburgh And Brooklyn Do Not Involve An Unreasonable Risk Of Harm And Fail To State Claims In Tort

Petitioners do not contend that the low pressure turbine claims of the second amended complaint, which seek recovery for various repairs or replacements with respect to the low pressure turbines of the Stuyvesant (JA-195-196), Williamsburgh (JA-197) and Brooklyn (JA-198-99), satisfy the rule applied by the Court of Appeals. *See* Pet. Br. 25. Indeed, petitioners do not allege that damage arose from a sudden or dangerous occurrence which involved an unreasonable risk of harm to persons or other property. As the District Court noted (Pet. App. at 70a n.15): "[T]he Second Amended Complaint sets forth no . . . factual allegations which would bring the low pressure turbines any closer than the high pressure ones to the *PGS* [*i.e.*, *Pennsylvania Glass Sand Corp.*, *supra*] standards for tort recovery." The Court of Appeals agreed with the District Court. Accordingly, the dismissal of the claims for damages pertaining to the low pressure turbines of these ships should be affirmed.

D. There Is No Basis For Recovery For High Pressure Turbine Damage Sustained By The Bay Ridge; The Factual Allegations Concerning Such Damage Are Virtually Non-Existent, And Nothing Allegedly Happened To The Bay Ridge Because Of It

Petitioners likewise concede that under the majority rule applied by the Court of Appeals, the fourth count fails to state a claim in tort. *See* Pet. Br. 25. First, the factual allegations of the fourth count, presumably concerning damage to the Bay Ridge's high pressure turbine, are "virtually non-existent." Pet. App. at 41a. Nothing is alleged to have happened to the Bay Ridge because of it. Accordingly, the fourth count fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 8(a), 12(b)(6).

Second, as the District Court stated (Pet. App. at 68a), "[i]nsofar as Count Four of the Complaint sets forth a claim for . . . defects in the Bay Ridge's turbine, which particular defects never manifested themselves except upon examination, plaintiff Richmond must also be relegated to contract law for its recovery."

Third, Richmond seeks recovery on the fourth count for damage sustained by the ship before it chartered the ship on March 15, 1979. 752 F.2d at 907, Pet. App. at 8a; JA-194-95, 199. Richmond had no interest in the Bay Ridge before it chartered it. Therefore, Richmond may not recover damages on the fourth count.

Accordingly, the dismissal of the fourth count should be affirmed.

E. The Bay Ridge Claim For Low Pressure Turbine Damage Due To Alleged Negligent Supervision Of The Installation Of Its Astern Guardian Valve Is Not Cognizable In Tort; The Bay Ridge Did Not Sustain A Sudden Or Dangerous Occurrence

The fifth count seeks recovery for damages sustained because of Delaval's alleged negligent supervision of the installation of the Bay Ridge's astern guardian valve, which was

installed in reverse. JA-205-207; Pet. App. at 74a. The astern guardian valve is part of the integrated main propulsion unit which Delaval sold for the Bay Ridge, pursuant to a single sales contract. JA-179; Pet. App. at 73a, 78a-79a n.10. The product is characterized by Richmond in the Second Amended Complaint as a "fully installed main propulsion unit . . . including . . . a certain guardian valve." JA-202, 178; *see also* JA-205-6; Pet. App. at 79a n.10.

The alleged damage was sustained because of "internal deterioration and breakdown" (Pet. App. at 79a) which eventually caused the ship to experience vibration regarded as unacceptable and enter port for repairs. Pet. App. at 75a, 79a-80a. There was no accident of violence or collision with external objects. Pet. App. at 78a. The former machinery superintendent of Seatrain Shipbuilding Corp. testified that the reverse installation of the astern guardian valve was not dangerous (JA-179-80; Pet. App. at 78a); and the District Court found no evidence that it "constituted a safety hazard that posed a serious risk of harm to persons or property." Pet. App. at 78a. Nor did the Court of Appeals.[41]

Under these circumstances, as the Court of Appeals held, there is no basis for recovery in tort for the alleged negligent supervision of the installation of the astern guardian valve. The focus of the analysis is on whether the defect has disappointed economic expectations or exposed persons or other property to injury or an unreasonable risk of injury. Whether the defect stems from a manufacturing, design or installation failure has no bearing on this analysis. On point is *S.M. Wilson & Co. v. Smith International, Inc.*, 587 F.2d 1363, 1368 (9th Cir. 1978), where the buyer of an unsatisfactory (but not hazardous) tunnel boring machine sued a seller for negligently

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41 In neither of its decisions on the fifth count did the District Court find that the events relating to the Bay Ridge caused unreasonable risk of harm to any person or property. *See* Pet. App. at 70a-71a, 78a-80a. *Cf.* Pet. Br. 19-20. The Court of Appeals agreed with the District Court. Petitioners nonetheless urge (at Pet. Br. 25) without pointing to any specific evidence that there was a potential hazard. Petitioners' unsubstantiated claim is without merit.

supervising the assembly of the machine, since its "thrust rollers had been installed in a reverse position." The machine had been shipped in parts to the buyer for assembly by the buyer's employees under the direction of a supervisor provided by the seller. The court found that recovery in negligence should be denied and the buyer's rights limited to those provided by contract law. *Id.* at 1376; *see* Pet. App. at 80a.[42]

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit dismissing this action should be affirmed.

Dated: December 19, 1985

Respectfully submitted,

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42 *Accord*, *Flintkote Company v. Dravo Corporation*, 678 F.2d 942, 950-51 (11th Cir. 1982) (recovery in tort denied for negligent supervision of assembly and erection of traveling ship unloader which was rendered inoperable); *Jones & Laughlin Steel Corp.*, 626 F.2d at 282, 289-90 (recovery in tort denied for negligent supervision of installation of roofing material); *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981) (recovery in tort denied for negligent supervision of installation of a hot plate press, where no personal injuries or damage to other property).

43 For Delaval's statement pursuant to Sup. Ct. R. 28.1, see Respondent's Brief In Opposition To Petition For A Writ Of Certiorari dated June 12, 1985 at 1 n.1.

AMICUS CURIAE

BRIEF

(5)

No. 84-1726

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EAST RIVER STEAMSHIP CORP., KINGSWAY TANKERS, INC., QUEENSWAY TANKERS, INC. and RICHMOND TANKERS, INC.,
Petitioners,

vs.

TRANSAMERICA DELAVAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF POTT INDUSTRIES INC. IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a product defect which causes neither physical harm nor property damage justifies the recognition of an admiralty tort remedy in addition to traditional contractual remedies in favor of commercial buyers for products which do not perform up to their expectations.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pott Industries, Inc. ("Pott") hereby respectfully moves the Court for leave to file the attached Brief Amicus Curiae in this case. The consent of counsel for the Petitioners and Respondent was requested but refused.

Pott has a direct interest in this case in that it has filed a petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit which is now pending in this Court involving the same issue, namely, whether there should be a tort remedy in admiralty for repair costs and other economic losses incurred because of a defective product which caused neither physical harm nor threat of physical harm to persons or property. *Pott Industries Inc. v. Ingram River Equipment, Inc.*, No. 85-12 (filed July 5, 1985).

In that case Pott extended express warranties to respondent in the contract of sale and the contract did not negate all implied warranties. In this case Petitioners were bareboat charterers not the direct purchaser of the vessels involved. It does not appear from the opinion below or from the brief filed by Petitioners whether they were beneficiaries of the express or implied warranties accompanying the contract of sale pursuant to which the defective products installed in the ships they chartered were sold.

For this reason, Pott suggests that the brief amicus curiae which it is requesting permission to file may contain a more complete discussion of the issue of the propriety of recognizing a tort remedy in derogation of the express and implied contractual undertakings of the parties than the briefs filed by the parties. Accordingly, Pott respectfully requests permission to file the attached brief amicus curiae.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF POTT INDUSTRIES INC.

Pott Industries, Inc. ("Pott") supports the position of Respondent Transamerica Delaval, Inc. and respectfully urges the Court to affirm the decision below of the United States Court of Appeals for the Third Circuit. The consent of the parties for filing of this brief was sought but refused.

INTEREST OF THE AMICUS CURIAE

Pott has a direct interest in the outcome of this case in that it is the Petitioner in a case presently pending on a petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in this Court involving the same issue, namely,

whether there should be a tort remedy in admiralty for repair costs and other economic losses attributable to a defective product which caused neither physical harm or the threat of physical harm to persons or property. *Pott Industries Inc. v. Ingram River Equipment, Inc.*, No. 85-12 (filed July 5, 1985). The decision by the United States Court of Appeals for the Eighth Circuit in that case was in conflict with the opinion of the Third Circuit under review here. *Ingram River Equipment Co. v. Pott Industries Inc.*, 756 F.2d 649, 653 (8th Cir. 1985). Thus, in all likelihood, the Court's opinion herein will be dispositive of Pott's pending petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Federal maritime law should follow the overwhelming majority of state courts in precluding recovery in tort for repair costs and other economic losses caused by qualitative defects in a product which do not create an unreasonable risk of physical injury or property damage. In such a situation, there is no need to create a tort remedy to protect commercial buyers of relative equal bargaining power, particularly where the parties are in a direct contractual relationship. The imposition of a tort remedy would subvert a carefully crafted body of commercial law, as well as the agreement of the parties themselves, and give commercial buyers a better bargain than they made. Accordingly, *Amicus* respectfully urges the Court to affirm the judgment below.

ARGUMENT

This case presents the Court with a clear choice between competing policy considerations to determine whether a federal court sitting in admiralty should look to tort law or commercial law as the source of legal obligations with respect to defective products which cause no physical injury or damage to property. The overwhelming majority of state jurisdictions hold that the recovery of losses suffered in such a situation should be governed by principles of commercial law, including the law of express and implied warranties as codified in the Uniform Commercial Code, and not by principles of tort law such as strict liability and negligence.

The majority rule in the state courts, sometimes called the "economic loss doctrine," better serves the allocation of risks between buyers and sellers of goods because it enforces the express and implied agreements for which they have bargained and does not bestow an economic windfall on either party to a contract of sale. The fact that a product failed to live up to commercial expectations while employed in a maritime activity does not justify a departure from the majority rule. The Appendix to this Brief is a fifty state survey showing the overwhelming majority support for the economic loss doctrine.

Petitioners' suggestion that consideration of state law by admiralty courts is inappropriate, Pet. Br. at 9-11, is incorrect. This Court has frequently been informed by state law principles in deciding issues of maritime law where they are not inconsistent with express statutory commands. *See, e.g., American Export Lines v. Alvez*, 446 U.S. 274, 285 & n. 11 (1980) (survey of state decisions showing clear majority allowing recovery for loss of consortium "far more persuasive" in ruling upon similar question under maritime law than interpretation of Federal Employers Liability Act); *Sea-Land Services v. Gaudet*, 414 U.S. 573, 587-588 & n. 21 (1974) (permitting recovery for various elements of damage in maritime wrongful death action aligns maritime remedy with majority of state wrongful death

statutes). In *Just v. Chambers*, 312 U.S. 383 (1941) the Court recognized that "in all maritime countries there is a considerable body of municipal law that underlies maritime law as the basis of its administration." *Id.* at 390. Thus, while admiralty courts make their own decisions, they should be "sensitive to whether a 'significant policy' of the state within whose territorial waters the injury occurred 'would be frustrated by such an application' [citation omitted]." *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1427 (5th Cir. 1983).

A. The Economic Loss Doctrine Is Founded On The Nature Of The Defect Not The Injury

The denomination of the majority rule as the economic loss doctrine is something of a misnomer in that it tends to focus attention on the injury caused by a defective product rather than on the nature of the defect which caused the loss. As a consequence, the doctrine has often been unfairly criticized as arbitrary and dependent for its application upon the fortuitous happenstance of whether a plaintiff was unlucky enough to suffer physical injury or damage to property other than the defective product. *See, e.g., Emerson G. M. Diesel, Inc. v. Alaskan Enterprise*, 732 F.2d 1468, 1474 (9th Cir. 1984). Petitioners join in this inaccurate criticism by suggesting that the charterers of the ships involved in this case could have recovered their economic losses if only a seaman had been burned by escaping steam from the defective turbine. Pet. Br. at p. 16.[1]

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[1] The facts in *Ingram, supra*, demonstrate the error in giving this argument serious weight. In *Ingram* the defective products were leaking steam heating coils in petroleum barges. The leaks were not a threat to the safety or seaworthiness of the barges, did and could not cause a hazard to navigation, and did not and could not damage the cargo or cause a personal injury. The leaks merely made it more difficult to unload the barges in cold weather. The damages recovered were for the cost of repairing and replacing the steam coils. *Id.* at 651.

Despite its name, it is the nature of the defect not the nature of the loss which governs the applicability of the economic loss doctrine. The relevant defects are "qualitative defects which defeat commercial expectations." Bertschy, "Negligent Performance of Service Contracts and the Economic Loss Doctrine," 17 *J. Mar. L. Rev.* 249, 266 (1984). More simply, if a defective product won't work up to standards or needs repair the majority rule tells the owner to look to the commercial law for his remedy. On the other hand, if a defective product injures the owner or his property he may also look to the tort law for his remedy. In either case if the owner suffered economic loss because of the product's failure such loss can be, if all other requirements (such as the speculative limitations on recovery of lost profits) are met, included in the owner's measure of damages under commercial or tort law.

B. Preservation Of The Economic Loss Doctrine Is Particularly Important In Transactions Between Commercial Maritime Entities

There is considerable confusion between tort and commercial law in the products liability field. One reason for the confusion was the historical perception that contract law, with requirements for recovery such as privity of contract and the inability of parties to protect themselves from boilerplate disclaimers of liability, was inadequate to protect consumers from physical harm to themselves and their property. Thus, through the torts of strict liability and negligence, for reasons of public policy the courts stepped in to reallocate the risk of such losses so that those thought most able to control them—the manufacturers who put the defective product into the channels of trade—were made liable for the personal injuries and property damage caused by their products. These principles are now firmly established in admiralty and are not at issue here.

Since this body of product liability law grew out of the principle of protection from harm, the Courts have long recognized that an essential element of both torts is physical injury or undue risk of physical injury attributable to the defective product. These basic principles are codified in §402A (strict liability) and §395 (negligence) of the Restatement of Torts, 2nd.

Nevertheless, perhaps because of the historic confusion, some states departed from the majority rule and permitted consumers and, on rare occasions, other buyers to proceed in tort even though the defective product did not cause or threaten physical harm. The Appendix to this brief surveys the law in each of the fifty states on this subject. It shows that the smattering of states which have rejected the economic loss doctrine have been greatly influenced by the historical perception that consumers are not adequately protected by commercial law.

None of these concerns apply, however, where the parties are commercial entities of relatively equal bargaining power. This is particularly true where the parties are in a direct contractual relationship where the issues of liability for product quality have been specifically addressed in their agreement, either through express or implied warranties, disclaimers of warranties or other provisions limiting or extending liability as permitted by the Uniform Commercial Code. The purchaser of a supertanker or a river barge simply does not need the same protection from the possibility of overreaching contractual clauses that some state courts think the purchaser of an automobile or a hairdryer may need. Indeed, the Uniform Commercial Code was designed in large part to govern product quality disputes between manufacturers and commercial buyers, regardless of whether the product is a railroad car or a river barge. *See, e.g., Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N. J. 555, 489 A.2d 660, 671 (1985).

Contracts to build or equip large commercial vessels are typically not adhesion contracts filled with fine print which purport to do away with all rights of the buyers. To the contrary,

they are complex, highly technical documents drafted with the assistance of counsel and carefully tailored to the particular requirements of the parties. The imposition of a tort remedy which displaces or enlarges the carefully negotiated allocation of risk of loss between the parties, in effect, gives the commercial buyer a better bargain than it made. In such circumstances, we suggest that the public maritime policy would be better served by enforcing the allocation of risks contained in the agreement and the Uniform Commercial Code rather than engrafting an allocation of risks upon the parties as a matter of public policy without reference to their agreement and commercial practice.

Moreover, we urge the Court to carefully consider the effect of a possible decision in favor of the Petitioners with regard to the continued viability of the Uniform Commercial Code. This has been a major consideration with those state courts which have had to struggle with this question. For example, in *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 285-286 (Alaska 1976), the court reasoned that permitting the use of a tort remedy where there has been no physical harm either to persons or property jeopardized the continued viability of the Uniform Commercial Code. The New Jersey Supreme Court, one of the leaders in the early assault on the citadel of the economic loss doctrine, has recently reversed itself at least as between commercial buyers and sellers and held that permitting a tort recovery in these circumstances "would dislocate major provisions of the code." *Spring Motors, supra,* 489 A.2d at 671.

The Uniform Commercial Code represents a comprehensive statutory codification of commercial common law principles evolving out of the law merchant which meet the needs of the world of commerce. It has been enacted in every jurisdiction except one. The Code affords ample protection to commercial buyers and sellers for the type of losses suffered here. Moreover, it provides the necessary uniformity and consistency

to serve the needs of maritime buyers and sellers.[2] Since it is a codification of common law, its principles are not foreign to admiralty courts.

C. Insurance And Perceived Inadequacy Of The Contractual Remedy Are Not Valid Reasons For Discarding The Economic Loss Doctrine

It has been suggested that insurance can be obtained to protect the manufacturer against a claim for purely economic losses. *See Emerson, supra,* 732 F.2d at 1474. If anything, the question of obtaining insurance in such a situation actually supports the need for preserving, instead of discarding the economic loss doctrine in admiralty. Insurance, if available, has a cost that the parties did not bargain for insofar as contract damages are concerned. If the Court were to recognize a tort action in negligence or strict liability for what is in essence a breach of contract, it will be imposing the cost of insurance (or its alternative) upon the manufacturer regardless of how the parties allocated their risks in the contract.[3]

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[2] In addition, the application of tort law principles to suits between parties with express written contracts may displace the agreement of the parties themselves. For example, the parties in the *Ingram* case had an express provision selecting the law of the State of Missouri as the law governing the contract. Under Missouri law, it is clear that the recovery sought by Ingram in tort could not have been had because of the application of the economic loss doctrine. *R. W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818 (8th Cir. 1983). The effect of creating a tort remedy is to completely negate such bargained for provisions. In addition, other limitations of commercial law such as requirements of notice, differing statutes of limitations, and contractual disclaimers expressly provided for in either the contract or the Uniform Commercial Code can also be avoided if a buyer is given a tort remedy in addition to his commercial remedies.

[3] Furthermore, many products liability insurance policies do not cover economic losses because of the inability to measure the risks involved. Standard commercial comprehensive general liability policies cover only personal injuries and property damage. J. White and R. Summers, *Uniform Commercial Code* §11-6, p. 410 n. 40 (2d ed. 1980).

The fear expressed by the Eighth Circuit in *Ingram, supra,* 756 F.2d at 653, that economic losses will be borne by innocent purchasers if the economic loss doctrine is followed in admiralty is equally unfounded. The commercial law of warranty provides a full, complete and adequate remedy for claims of defective products which do not cause or create an unreasonable risk of physical injury or physical harm to persons or property. The complaint in these cases is that the product did not perform "a certain task in a certain way." *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1170 (3d Cir. 1982). These purported tort claims are merely breach of contract suits in disguise.

D. Vendors Should Not Be Penalized When Dealing With The Maritime Industry

Petitioners advance no substantive reason why maritime and common law principles in the product liability field should be different. If the defective engine parts in this case had been installed in land vehicles rather than ships, the overwhelming majority of state court decisions demonstrate that the petitioners could not have recovered in tort for either negligence or strict liability. Instead, their right to recovery would have been governed by the contract between the parties and principles of law as codified in the Uniform Commercial Code.

The adoption of different principles of liability in admiralty for land based manufacturers who often supply the identical products to the vessels and land vehicles merely invites unfavorable price differentials for products sold to the already distressed maritime industry. Such discrimination is certain to have a more adverse effect on the viability of maritime commerce as a whole than the dubious benefit of protecting a few ship operators from the economic consequences arising out of their often intentional waiver of contractual remedies afforded by the Uniform Commercial Code.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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Fifty State Survey: Recovery of Economic Losses in Product Liability Tort Actions

In this Appendix *Amicus* has attempted to identify the most significant federal diversity or state court decision with respect to the product liability law in each of the fifty states on the subject of recovering economic losses caused by a defective product in a tort action. With some exceptions, the courts do not distinguish between negligence and strict liability claims in permitting or denying recovery for purely economic losses in tort. The substantive requirement of risk of physical harm should be a prerequisite to maintaining either tort claim. Compare §§395 and 402A of the Restatement of Torts (Second).

In all of the states, economic losses caused by a defective product are recoverable in contract actions under the contract of sale or under implied warranty theories pursuant to the Uniform Commercial Code. Such contract and warranty claims are usually much easier to prove than a tort claim particularly for negligence. However, the parties frequently by the terms of the contract of sale have allocated their risks by limiting the extent of the seller's responsibility for a defective product. Common examples are provisions limiting the seller's obligation to a duty to repair or replace the defective product and disclaimers of responsibility for consequential damages or for products which fail after a year of satisfactory service. Since such limitations are seldom found to restrict the amount of damages a plaintiff can recover if permitted to pursue a tort claim, federal diversity and state courts are frequently confronted with complaints which attempt to plead a tort claim — usually negligence or stricty liability — predicated solely on the failure of a product to perform properly without posing any risk of physical harm to persons or property.

A. Majority View: Where Plaintiff's Only Loss Is An Economic Loss, There Is No Recovery In Tort

The majority view is represented by those states which follow the historic decision of Chief Justice Traynor in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145 (en banc 1965). The essence of the doctrine was articulated as follows:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. 403 P.2d at 151.

Several of the majority states would allow recovery when the defective product is damaged by a sudden or violent occurrence — such as a fire. While recovery of economic losses would be denied in such circumstances by courts which strictly adhere to *Seely*, this minor variation in the majority rule is unimportant in this case because there was no such occurrence.

ALASKA

When a defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger, strict liability in tort is an appropriate theory of recovery, even though the damage is confined to product itself. Otherwise, there is no tort recovery for direct economic loss.

Northern Power & Engineering Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329 (Ala. 1981)

Morrow v. New Moon Homes, Inc., 548 P.2d 279, 284-86 (Alaska 1976)

ARIZONA

Where economic loss, in the form of repair costs, diminished value, or lost profits is the plaintiff's only loss, the policies of the law will generally be best served by leaving the parties to their commercial remedies.

Salt River Project Agr. Improvement & Power District v. Westinghouse Electric Corp., 694 P.2d 198, 209-10 (Ariz. *en banc* 1984)

CALIFORNIA

No tort recovery for economic losses.

Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (*en banc* 1965)

Contrary to Petitioners' assertion, Pet. Br. p. 13, n. 8, the California Court did not repudiate *Seely* in *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60 (1979). In fact, *J'Aire* is not even a products liability case and it does not even cite *Seely*.

COLORADO

No tort recovery under a strict liability theory for commercial or business loss.

Hiigel v. General Motors Corp., 544 P.2d 983, 989 (Colo. *en banc* 1976)

DELAWARE

No tort recovery for pecuniary losses that result from poor workmanship in the absence of an accident, collapse or explosion.

Crowell Corp. v. Topkis Const. Co., 280 A.2d 730, 732 (Del. Super. Ct. 1971)

FLORIDA

No negligence recovery for economic loss.

GAF Corp. v. Zack Co., 445 So.2d 350, 351-52 (Fla. App. 1984)

GEORGIA

In the absence of an accident, there can be no action in negligence to recover the loss of economic value of a defective product.

Vulcan Materials Company, Inc. v. Driltech, Inc., 251 Ga. 383, 306 S.E.2d 253, 254 (Ga. 1983)

IDAHO

No negligence recovery for loss of bargain.

Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784, 790-94 (1978)

ILLINOIS

Illinois recognizes that there is no negligence recovery for economic loss, however, recovery for damages to the product itself is allowed if the damage is caused by a sudden and calamitous occurrence due to the defect.

Vaughn v. General Motors Corp., 102 Ill.2d 431, 466 N.E.2d 195 (1984)

Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443, 451-52 (1982)

INDIANA

Loss of bargain not recoverable in negligence action.

Sanco, Inc. v. Ford Motor Co., 579 F.Supp. 893, 895-97 (S.D. Ind. 1984)

IOWA

No tort recovery for economic loss.

Midland Forge, Inc. v. Letts Industries, Inc., 395 F. Supp. 506, 514-15 (N.D. Iowa 1975) (predicting result Iowa Supreme Court would reach)

KANSAS

Kansas is classified in the majority because it has recently determined that in the absence of physical harm a remote purchaser of a defective product cannot even maintain an implied warranty action against the manufacturer for economic losses. It seems clear from the opinion that the Kansas Supreme Court would apply the same rationale in a tort claim.

Professional Lens Plan, Inc. v. Polaris Leasing Corporation, 234 Kan. 742, 675 P.2d 887 (1984)

MARYLAND

No tort recovery for economic loss.

Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312, 326 (D. Md. 1983) (predicting result Maryland Supreme Court would reach)

MASSACHUSETTS

In absence of personal injury or physical damage to property, the negligent supplier of defective products is not ordinarily liable in tort to a purchaser for simple pecuniary loss caused by defective or inferior merchandise.

Marcil v. John Deere Indus. Equip. Co., 403 N.E.2d 430, 433-34 (Mass. App. 1980)

MICHIGAN

The Uniform Commercial Code precludes an action for economic loss based on strict liability or negligence where a contractual relationship between the parties exists; however, in

absence of a contractual relationship the U.C.C. has no relevancy and such actions may be maintained. This appears to be a unique variation in the majority rule.

McGhee v. G.M.C. Truck and Coach Division, 98 Mich. App. 495, 296 N.W.2d 286 (1980)

Auto Owners Insurance Co. v. Chrysler Corp., 129 Mich. App. 38, 341 N.W.2d 223 (1983)

MINNESOTA

Economic losses arising out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under a negligence theory.

Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 161-63 (Minn. 1981)

MISSOURI

Recovery in tort is limited to cases in which there has been personal injury or property damage to property other than the property sold or to the property sold when it was rendered useless by some violent occurrence.

Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. *en banc* 1978)

R. W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 827 (8th Cir. 1983)

NEBRASKA

Loss of bargain, including damage to the product itself and to other property is not recoverable in tort.

National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39, 42-44 (1983)

Hawkins Const. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N.W.2d 643, 653 (1973)

NEVADA

No tort recovery for indirect economic loss.

Local Joint Executive Board of Las Vegas Culinary Workers Union, Local No. 226 v. Stern, 98 Nev. 409, 651 P.2d 637, 638 (1982)

NEW JERSEY

No recovery for economic loss in tort action between two commercial entities.

Spring Motors Dist., Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660, 670-71 (1985) (Reversing *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) at least insofar as mercantile parties are concerned)

NEW MEXICO

Tort theories of liability may not be utilized to recover for purely economic injuries.

Jo Allen v. Toshiba Corp., 599 F. Supp. 381, 384-85 (D.N.M. 1984) (predicting result New Mexico Supreme Court would reach)

NEW YORK

No recovery for direct economic loss in strict liability action.

Schiavone Construction Co. v. Elgood Mayo Corp., 56 N.Y.2d 667, 451 N.Y.S.2d 720, 436 N.E.2d 1322 (1982) (memorandum opinion adopting dissenting opinion of Silverman, J., 81 A.D.2d 227, 439 N.Y.S.2d 933 (1981))

John R. Dudley Const. v. Drott Mfg. Co., 66 A.D.2d 368, 412 N.Y.S.2d 512, 514-16 (1979)

NORTH DAKOTA

Direct economic loss is not recoverable in strict liability tort action.

Hagert v. Hatton Commodities, Inc., 350 N.W.2d 591, 594-95 (N.D. 1984)

PENNSYLVANIA

In an action between commercial enterprises, where defective design, manufacture and sale of a product is alleged, where there is nothing in the record to indicate that the defect is a condition potentially dangerous to persons or to property, and where the purported defect results in progressive deterioration of the product itself, the buyer's cause of action for its economic losses against the seller is in breach of warranty under the UCC.

Industrial Uniform Rental Company v. International Harvester Company, 463 A.2d 1085 (Pa. 1983)

RHODE ISLAND

No tort recovery for purely economic losses.

Hart Engineering Co. v. FMC Corp., 593 F. Supp. 1471, 1481-85 (D.R.I. 1984) (predicting result Rhode Island, Pennsylvania and Massachusetts Supreme Courts would reach)

SOUTH CAROLINA

When a loss results from mere product ineffectiveness, it is the law of contracts and commercial transactions, rather than strict product liability, which fixes responsibility for the loss.

Purvis v. Consolidated Energy Products Co., 674 F.2d 217, 221-231 (4th Cir. 1982) (predicting result South Carolina Supreme Court would reach)

WEST VIRGINIA

A plaintiff can recover for economic loss in a tort action only if it is caused by a violent or sudden accident.

Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854, 857-860 (W.Va. 1982)

B. Minority View: Purely Economic Losses May Be Recoverable In Tort

The smattering of states expressing the minority view are not very analytical and appear to involve some peculiarities native to their own jurisprudence. Ohio for instance recognizes a tort called breach of implied warranty. It, of course, would make no difference if the form of action is labeled contract or tort so long as the substantive rules are governed by Uniform Commercial Code instead of strict liability or negligence principles. Its decisions do not answer the latter question. Notwithstanding the Restatement, Texas, Utah and Oregon distinguish between negligence and strict liability and Utah appears to classify deterioration of the defective product as property damage in an effort to stay within the rubric of Restatement §§402A and 395. Montana, Washington and Wisconsin have followed the leading case articulating the minority rule, *Santor, supra*, in the past. However, their decisions were reached before the New Jersey Court reversed *Santor* in a commercialsetting. Thus, it is uncertain what their position is today.

MONTANA

Loss of bargain is recoverable in a strict liability action.

Thompson v. Nebraska Mobile Homes Corp., 647 P.2d 334, 336-338 (Mont. 1982)

OHIO

Loss of bargain is recoverable in a tort action based on breach of an implied warranty.

Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267, 271 (1975)

OREGON

Plaintiff can recover foreseeable economic losses in a negligence action. Plaintiff may also recover foreseeable economic losses in a strict liability action if the defect is

unreasonably dangerous and it is the unreasonably dangerous defect which causes damage to the product.

Russell v. Ford Motor Co., 281 Or. 587, 594-96, 575 P.2d 1383, 1386-88 (1978)

State ex rel. Western Seed Production Corp. v. Campbell, 250 Or. 263, 269-70, 442 P.2d 215, 218 (1968)

TEXAS

While loss of bargain is not recoverable in strict liability action, it is recoverable in a negligence action.

Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 83 (Tex. 1977)

UTAH

Damages resulting from product's deterioration are recoverable in a negligence action.

W.R.H., Inc. v. Economy Builders Supply, 633 P.2d 42, 44-46 (1981)

WASHINGTON

Economic loss is recoverable in a tort action.

Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818, 823 (*en banc* 1976)

WISCONSIN

Economic losses are recoverable in a tort action unless public policy considerations intervene.

A. E. Investment Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 214 N.W.2d 764, 770 (1974)

C. States Which Have Not Decided The Issue

No published authority was found in the following states giving a clear indication of their view of the recoverability of economic losses in a tort action. Arkansas has not been included in this survey since it has adopted a products liability statute, Ark. Stat. Ann. §85-2-318.2.

Alabama
Connecticut
Hawaii
Kentucky
Louisiana
Maine
Mississippi
New Hampshire
North Carolina
Oklahoma
South Dakota
Tennessee
Vermont
Virginia
Wyoming

AMICUS CURIAE

BRIEF

No. 84-1726

In The
Supreme Court of the United States
October Term, 1985

EAST RIVER STEAMSHIP CORP., KINGSWAY TANKERS, INC., QUEENSWAY TANKERS, INC. and RICHMOND TANKERS, INC.,
Petitioners,

vs.

TRANSAMERICA DELAVAL INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* and BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. IN SUPPORT OF RESPONDENT

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45pp

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The Product Liability Advisory Council, Inc. ("PLAC") and the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), pursuant to Rule 36.3 of this Court, respectfully request leave to file a brief *amicus curiae* in general support of the respondent, Transamerica Delaval Inc. Respondent's counsel has consented to PLAC and MVMA filing such a brief, but counsel for the petitioners has not consented.

PLAC is a non-profit membership corporation formed in June, 1983, pursuant to Act 162, State of Michigan Public Act of 1982.[1] The principal purpose of PLAC is to submit briefs, as friend of the court, in appellate cases involving significant issues affecting the law of products liability.

MVMA is a trade organization whose members build over ninety-nine percent of all motor vehicles produced in

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1. PLAC members are: American Honda Motor Company, Inc., Automobile Importers of America, Inc., Black & Decker Company, The Budd Company, Clark Equipment Company, The Firestone Tire & Rubber Company, FMC Corporation, Fruehauf Corporation, Great Dane Trailers Inc., J.L.G. Industries, Motor Vehicle Manufacturers Association of the United States, Inc., Nissan Motor Corporation, Porsche Cars North America, Inc., Saab-Scania of America, Inc., Subaru of America, Inc., Toyota Motor Sales, U.S.A., Inc., and U-Haul International, Inc.

the United States.[1] Its members also manufacture other products such as farm, industrial, lawn and garden tractors, agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, turbines, and gasoline and diesel engines for industrial, maritime and agricultural uses.

PLAC and MVMA, and their members, have a real and vital interest in the result reached in the decision below. That determination, reported at 752 F.2d 903 (3d Cir. 1985), refused to stretch the doctrine of products liability in tort beyond its traditional and policy-oriented purposes. In doing so, it rejected the prayer for the creation of a new tort remedy for commercial entities disappointed in the quality or performance of products they purchased under contract. Rather, the Third Circuit left such commercial entities to the remedies they bargained for or might have obtained under contractual arrangements governed by the law merchant and the law of sales.

Member companies of PLAC and MVMA, as well as other product manufacturers throughout the nation, regularly enter into sales and distribution contracts specifying the nature and extent of warranties regarding the quality of their goods. Such agreements are often concluded, on the basis of prevailing market conditions, with suppliers and contractors "upstream" as well as commercial purchasers "downstream," such as wholesalers, retailers or direct buyers. All agreements are not necessarily identical or symmetrical. Prices, terms and conditions

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2. MVMA members are: AM General Corporation, American Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, International Harvester Company, M.A.N. Truck & Bus Corporation, PACCAR Inc., Volkswagen of America, Inc., and Volvo North America Corporation.

are negotiated and agreed upon under circumstances peculiar to the parties involved. Businessmen engaged in this dynamic and ever-changing process obviously must rely upon the sanctity of contracts and the predictable and balanced scheme of the law merchant in order to function.

Simply stated, the modern law of sales permits product manufacturers and others in the chain of distribution to bargain freely, allocate responsibilities for commercial disappointments and, in an orderly fashion, to distribute the results of such alleged disappointments throughout the market via a number of recognized mechanisms.

The attempt in this case, however, to turn the law merchant into yet another tort arena is one that is viewed by PLAC and MVMA members with justifiable concern. Petitioners, in effect, invite this Court to rewrite the law of contract and warranty by elevating commercial frustrations on the part of sophisticated purchasers into an essentially unrestricted, unpredictable tort scheme. The conceptual basis of tort liability as well as compelling policy considerations, however, dictate a contrary result.

Members of PLAC and MVMA are, of course, acutely aware of the need for product safety and the manner in which products liability in tort is said to play a role in that sphere. Petitioners here, however, seek to extend tort concepts well beyond their recognized purposes. The attempted displacement of the law of sales, which routinely governs disappointments in product quality or the recovery, if any, of consequential damages, is fraught with grave policy consequences far beyond the interests of the litigants in this one case.

The spectre of the proverbial "widget" manufacturer being saddled with repeated and unbargained-for multi-

million dollar liability, where no personal injury or accidental damage to property has occurred, is hardly theoretical. In effect, this is such a case! What incentives, one may ask, will continue to motivate the maker of the modestly-priced "widget" when his limited contractual obligations are replaced by unbargained-for, astronomical tort liability? What commercial stability can there be when a contractual limitations period running from sale would be displaced by an unlimited and uncertain tort liability running from the perceived disappointment of some performance feature? Indeed, the manufacturer of the durable, long-lasting product will be penalized because of the open-ended, continual threat of tort liability for quality disappointment extending far into the future. Such incongruities are among the policy imperatives PLAC and MVMA would demonstrate in their *amicus curiae* brief.

The general proposition advanced by Petitioners is not new. It has been addressed and rejected over the years by the vast majority of state courts. In the context of commercial purchasers, it has even been rejected in 1985 by the Supreme Court of New Jersey, which had earlier published the lead judicial opinion representing the minority viewpoint. See *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (Sup. Ct. 1985).

Undoubtedly, petitioners recognize this problem for they urge this Court to adopt a unique rule for admiralty. If permitted, however, PLAC and MVMA will demonstrate, in the annexed brief, that the "maritime" context of this case is largely irrelevant. The balance of competing policies warrants the same result in this type of "admiralty" case as in land-based commercial dusputes. The concern of courts to deter "unreasonably unsafe" products from causing injuries is the same in admiralty as on land. So, too, the concern of courts to preserve a

predictable, balanced and orderly law merchant spans land and sea.

What this Court decides about the instant dispute is likely to have profound influence upon lower courts and the business community at large. PLAC and MVMA, whose members constitute a significant segment of that community, accordingly request leave to submit this brief as *amici curiae,* to discuss the major policies involved and to urge the continued recognition of the distinct purposes and applications of products liability in tort and the law of sales.

WHEREFORE, it is respectfully requested that PLAC and MVMA be granted leave to file a brief *amicus curiae.*

Dated: New York, New York
December 17, 1985

Respectfully submitted,

MICHAEL HOENIG
Counsel of Record for
The Product Liability Advisory Council, Inc. and Motor Vehicle Manufacturers Association of the United States, Inc.

QUESTIONS PRESENTED

1. Shall the law merchant or products liability in tort govern disputes alleging failure of a product to meet the expectations of a commercial user, in the absence of personal injury or damage to property resulting from an accident, mishap or injurious occurrence?

2. Does the balance of competing policies, if any, warrant a result in the admiralty context which is different from the reasoned approach taken by the vast majority of jurisdictions in land-based disputes?

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NO. 84-1726

IN THE
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OCTOBER TERM, 1985

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI CURIAE*

The decision of the Court of Appeals below addressed the issue whether, in a maritime context, a commercial en-

tity's disappointment in the performance or quality of a product should be governed by the law merchant or by an expanded version of products liability in tort. The Third Circuit, in accord with the vast majority of state and federal courts, held that tort products liability was neither intended, nor is it suitable, as a means of redress under such circumstances. Commercial entities similarly situated should be left to the contractual remedies they made or could have bargained for in their contractual dealings.

PLAC and MVMA member companies are vitally interested in supporting affirmance of this reasoned approach. What is involved is application of distinct legal principles. The sanctity of arm's-length, negotiated commercial arrangements made by manufacturers and distributors of goods throughout the country, which govern the allocation of responsibilities and risks regarding the quality of goods, would be severely jeopardized if the position advanced by petitioners were adopted. The balance and predictability so necessary to commerce, trade and risk management would be subverted. In its stead would be an expanded concept of tort liability, unlimited by time or amount, and limited conceptually only by the after-the-fact, often subjective "expectations" of the commercial purchaser.

As *Amici* will demonstrate, the major policies underlying products liability in tort, the law merchant *and* the law of admiralty all point to the need for a clear demarcation between tort law applicable to circumstances involving personal injuries or property damage caused by unreasonably dangerous defects, and a law merchant applicable to "benefit of the bargain" and consequential damage disputes flowing from a buyer's disappointment in the quality of goods. PLAC and MVMA accordingly urge affirmance of the determination below.

STATEMENT OF THE CASE

Amici adopt, in the main, respondent's statement of the case. It is important, however, to identify certain features in the record which underscore the policy considerations addressed in this brief.

1. The record indicates that three of the named petitioners (East River Steamship Corp., Queensway Tankers, Inc. and Richmond Tankers, Inc.) are subsidiaries of Seatrain Lines, Inc. (J.A. 11, 138-139); the fourth petitioner has officers and directors substantially identical to the other three (J.A. 141). Seatrain Shipbuilding Corp. is a wholly-owned subsidiary of Seatrain Lines, Inc., and built each of the vessels involved herein (J.A. 142-156).

2. Purchase from Delaval of the turbines involved in this suit followed negotiations by a representative acting on behalf of both Seatrain entities *and* the named petitioners (J.A. 169-170). The purchase contract consisted of the detailed proposal made by Delaval, the technical proposal and a purchase order issued by Seatrain Shipbuilding (J.A. 171-172).

3. The proposal issued by Delaval expressly set forth a warranty for the turbines limited both temporally and substantively. The warranty expressly excluded liability for consequential damages of the sort claimed herein (J.A. 78). These limitations were fully known to the representative of petitioners negotiating the purchase of the turbines (J.A. 172-173). There is no claim that Seatrain or petitioners misunderstood the import of the contractual provisions or that the entities did not have access to or potential advice from legal counsel about the nature and extent of such limitations.

4. The purchase order issued by Seatrain reflected some modification of the terms of Delaval's proposal (compare J.A. 81 with J.A. 79), but specified no alteration or modification of the limited warranty in the Delaval proposal (J.A. 81-82).

5. Each bareboat charter party, entered into by the respective petitioners contemplating the completed vessels with installed turbines, contained extensive agreements allocating risks and providing for commitments to secure a variety of insurance coverages (J.A. 86-138).

6. Common to all allegations of strict tort liability advanced by petitioners is the assertion that loss was suffered as a result of inferior "first stage steam reversing blade rings" which were "falling apart and ... disintegrating" (J.A. 14, 15, 16, 17). This "disintegration" allegedly occurred when turbine speed reached over 95% of maximum, with a concomitant increase in temperature of the affected portion (J.A. 186-187).

7. Petitioners concede that the damages they claim are related solely to the cost of repairs and consequential losses such as "down time" allegedly caused by "the turbines' failure to function as expected by plaintiffs" (J.A. 210; see J.A. 212).

8. The replacement cost of each allegedly unsatisfactory "first stage reversing blade ring" was $32,000 (J.A. 56, 62, 69). The cost of constructing each ship involved was approximately $125,000,000 (J.A. 163). Damages claimed with respect to each ship range from slightly over $1,000,000 to in excess of $3,000,000 (J.A. 46-73).

The foregoing facts set into sharp focus petitioners' unmerited attempt to engraft an expansive tort liability

concept upon routinely contractual arrangements between sophisticated commercial entities respecting the sale of goods. As will be demonstrated, the Third Circuit correctly identified the nature of the dispute and the distinct functions of the different legal concepts.

SUMMARY OF ARGUMENT

The historical evolution and policy underpinnings of products laibility in tort amply demonstrate that the doctrine was designed and intended to protect consumers from defects presenting an unreasonable risk of harm which culminates, through an accident, mishap or occurrence, in physical injury or property damage. Products liability in tort, whether under the rubric of strict tort liability or negligence, is unsuitable as a substitute for the Uniform Commercial Code and other sales-oriented remedies. The balance of competing policies favors leaving sophisticated commercial purchasers to contractual remedies for the benefit of their bargains where there is no physical personal injury or damage to property caused by an accident or mishap.

This approach is also entirely appropriate in a maritime context. The major policies which distinguish between tort products liability and the law merchant are no less applicable to disappointed expectations on the sea than they are on land. Since many lower courts have applied products liability in tort in admiralty law, logic dictates that this Court impose the limitations which inhere in the very bases of that doctrine. Indeed, the objectives of admiralty law to enhance commerce and trade, and the comparatively superior ability of commercial maritime entities to distribute and allocate risks through insurance or otherwise, reinforce the propriety of applying the law of sales to the instant circumstances.

ARGUMENT

POINT I

NEITHER THE HISTORICAL NOR POLICY UNDERPINNINGS OF PRODUCTS LIABILITY IN TORT JUSTIFY DISPLACEMENT OF THE LAW MERCHANT APPLICABLE TO DISPUTES AMONG COMMERCIAL ENTITIES DEALING AT ARM'S-LENGTH. SUCH TORT CONCEPTS SHOULD BE RESTRICTED TO CIRCUMSTANCES INVOLVING AN UNREASONABLY DANGEROUS PRODUCT DEFECT CAUSING A PHYSICAL PERSONAL INJURY OR PROPERTY DAMAGE ARISING FROM AN ACCIDENT OR MISHAP.

The enormous expansion of tort products liability suggested by petitioners should not be determined in a legal vacuum. Petitioners' failure to address the law merchant, whether in its common law form or as statutorily codified (e.g., the Uniform Commercial Code), is understandable, for traditional sales and warranty law policies effectively refute their abstractly-made contentions.

The Uniform Commercial Code and the modern law of sales exist for the purpose of bringing balance, order and predictability to commercial transactions. *E.g., Cleveland Lumber Co. v. Proctor & Schwartz, Inc.,* 397 F.Supp. 1088, 1092 (N.D. Ga. 1975). Sales law protects the expectations of commercial purchasers by, among other things, establishing legally recognized warranties as well as limits on those warranties where agreed upon in arm's-length bargaining. See *Two Rivers Co. v. Curtiss Breeding Service,* 624 F.2d 1242, 1251 (5th Cir. 1980), *cert. denied,* 450

U.S. 920 (1981). Such provisions have a unique function where limitless consequential losses might be sought for the alleged failure of a product to meet the expectations of a commercial purchaser. See Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.,* 48 Mo. L.Rev. 1, 7 (1983); Speidel, *Products Liability, Economic Loss and the UCC,* 40 Tenn. L.Rev. 309, 317 (1973); Comment, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy,* 4 Seton Hall L.Rev. 145, 179 (1972).

Nothing in the factual foundation of this case suggests any justification for a tort law remedy. The case at bar involves nothing more than a traditional arrangement replicated, more or less, on a daily basis in many forms. The contract resulted from negotiations between the parties who clearly are sophisticated and substantial commercial entities. The agreement unambiguously expressed the warranties covering the turbines and excluded liability for consequential damages. These were the terms bargained for. They undoubtedly influenced the purchase price and other obligations. The dispute herein may properly be viewed as one involving not only dissatisfaction with the quality of the turbines purchased, but petitioners' after-the-fact disappointment with the substance of the contractual bargain they negotiated.

Against this background, petitioners' proposal to bring about an explosion in scope for products liability in tort must be viewed as an articulate but *post hoc* attempt to recoup the sales remedies which they could have, and perhaps should have, secured through contractual negotiation, or to obtain retrospective protection for losses they might have obviated via their own purchase of insurance coverage. As will be demonstrated, neither history nor

policy warrants the proposed expansion, however glibly it is advanced in the guise of "admiralty" concerns.

A. *The Historical Evolution Of Products Liability In Tort.*

Historical underpinnings of modern products liability law demonstrate its inapplicability to an action seeking recovery of consequential losses. Traditional bases of tort liability suggest that petitioners' position is not a proposed evolutionary step but, rather, a revolutionary departure from accepted principles.

As this Court is aware, the early general rule was that an injured party not in privity with the manufacturer of a product had no cause of action against that defendant. *Winterbottom v. Wright,* 10 Mees. & Welsb. 109 (1842); see *Loop v. Litchfield,* 42 N.Y. 351, 1 Am. Rep. 543 (1870). A recognized exception to the rule was expressed in *Thomas v. Winchester,* 6 N.Y. 397, 57 Am. Dec. 455 (1852), where defendant mislabeled a poisonous drug sold by him as harmless "extract of dandelion". The court upheld liability of the remote manufacturer, despite the absence of privity, by analogizing defendant's conduct to perilous acts which might properly be the basis for criminal liability. 6 N.Y. at 408-409. The court expressly rejected a contractual nexus for liability. The matter was squarely a tort issue, premised upon the extreme danger to human life inherent in the mislabeled product:

> "The defendant's negligence put human life in imminent danger. ... The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement. ... The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to [his vendee]; the wrong done by the defendant was in

> putting the poison mislabeled, into the hands of [his vendee], as an article of merchandise, to be sold and afterwards used, as the extract of dandelion, by some person then unknown." 6 N.Y. at 409.

Subsequently, the non-privity tort doctrine was expanded in *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.Y. 1050 (1916), to cover not only products that were *imminently* dangerous, but also those that were *inherently* dangerous. In no way was this determination a "marriage of contract and tort", as suggested by petitioners (Brief of Petitioners, p. 12). The determination rested entirely upon negligence, with focused emphasis upon the extreme danger to life and limb, in a now classic formulation:

> "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, *irrespective of contract,* the manufacturer of this thing of danger is under a duty to make it carefully." 217 N.Y. at 389; emphasis supplied.

Once again, a key determinant was the existence of a danger that resulted in a mishap causing personal injury or property damage. Under the philosophy of *MacPherson,* where a product, though defective, posed no danger or resulted in no accident or occurrence causing injury or property damage, *there was no tort.* Liability in such cases, if any, rested solely upon contract principles. *E.g., A.J.P. Contracting Corp. v. Brooklyn Builders Co.,* 171 Misc. 157, 11 N.Y.S.2d 662 (Sup. Ct., Kings Co. 1939), *aff'd,* 258 App. Div. 747, 15 N.Y.S.2d 424 (2d Dept. 1939), *aff'd,* 283 N.Y. 692, 28 N.E.2d 412 (1940); *Trans World Airlines v. Curtiss-Wright Corp.,* 1 Misc.2d 477, 148

N.Y.S.2d 284 (Sup. Ct., N.Y. Co. 1955), *aff'd*, 2 A.D.2d 666, 153 N.Y.S.2d 550 (1st Dept. 1956). In the latter case, the court expressed the limitation inherent in the *MacPherson* boundary line as applied to contractual disputes:

> "If the ultimate user were allowed to sue the manufacturer in negligence merely because an article with latent defects turned out to be bad when used in 'regular service' without any accident occuring, . . . manufacturers would be subject to indiscriminate lawsuits by persons having no contractual relations with them, persons who could thereby escape the limitations, if any, agreed upon in their contract of purchase. Damages for inferior quality, per se, should better be left to suits between vendors and purchasers since they depend on the terms of the bargain between them." *Trans World Airlines, supra,* 1 Misc.2d at 482; *accord, Amodeo v. Autocraft Hudson, Inc.*, 12 A.D.2d 499, 207 N..S.2d 101 (2d Dept. 1960).

Expansions beyond the *MacPherson* negligence rule stemmed from the perceived difficulty plaintiffs might have in proving actual negligence by a defendant. See *Prosser and Keeton on Torts* (5th ed. 1984), § 97, p. 690. Ultimately, the search for a means of avoiding the sometimes "difficult" proof of negligence led the courts temporarily to speak of expanded products liability in terms of implied warranty.

Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) is often cited as the lead case in this phase of development.[1] The court imposed

1. Some writers credit *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913) as the "father" of the warranty-based products liability concept. See Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment,* 60 Va. L. Rev. 1109, 1135 (1974). By all accounts, however, the concept lay in relative obscurity until *Henningsen. Prosser & Keeton on Torts, supra.*

manufacturer's liability when personal injuries were suffered by a remote user in a defective automobile. The court borrowed liberally from warranty concepts of contract (32 N.J. at 371-372), as well as from the law of agency (*Id.*, at 373-375), and misrepresentation (*Id.*, at 379). The key policy factors, however, favoring expansion of an implied warranty unlimited by privity or disclaimer were the hazards to life inherent in a defective automobile (*Id.*, at 386-387), coupled with the complete absence of parity in the bargaining positions between the manufacturer and the consumer (*Id.*, at 388-391, 404).

Tort scholars correctly observe that the *Henningsen* case itself bore the seeds of the decline of the expanded warranty theory espoused. The requirement of notice and other aspects of the law of sales, such as the statutory right to limit and exclude warranties, demonstrated the impropriety of attempting to fit the "square peg" of personal injury actions into the "round hole" of a sales-based warranty concept. See *Prosser & Keeton on Torts, supra,* at 691; Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C., supra,* 48 Mo. L. Rev. at 7-12.[2]

2. Among the anomalous consequences of relying upon a warranty base for products liability was invocation of the contractual statute of limitations period, which the resulting loss of the cause of action even before the affected plaintiff had any contact with the defective goods. *E.g., Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 305 N.Y.S.2d 490, 253 N.E.2d 207 (1969), *overruled* in *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275 (1975).

These insufficiencies ultimately caused most courts to return products liability for accidental personal injury to its tort origins. Eschewing all connections with contract theory, the court in *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963) declared the "new" concept of "strict liability in tort":

> "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." 59 Cal.2d at 62.

That decision, followed in 1965 by the publication of § 402A of the Restatement (Second) of Torts, resulted in the rapid adoption of products liability in tort as the fundamental legal mechanism for the protection of those injured by a product defect in an accident, mishap or occurrence. *Prosser & Keeton on Torts, supra,* at 694.

In formulating this products liability doctrine, the authorities consistently reiterated fundamental prerequisites of strict products liability: the presence of an unreasonably dangerous defect which, through some mishap, results in personal injury or damage to property. Indeed, for these reasons, *Greenman* refused to accord significance to contractual limitations of warranties:

> "[R]ules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purpose for which such liability is imposed. . . . The purpose of such liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." 59 Cal.2d at 63.

Section 402A similarly speaks of liability for "unreasonably dangerous" products which actually cause injury to person or property, as do the courts of most states. See, *e.g., Codling v. Paglia,* 32 N.Y.2d 330, 342, 345 N.Y.S.2d 461, 298 N.E.2d 622 (1973).

In this context, the issue of further expanding products liability in tort to cover mere "benefit of the bargain" and consequential economic losses was first addressed by the courts. Given the evolution of products liability, from its tort origins through its temporary warranty diversion and back to tort in its modern form, it is perhaps not surprising that the Supreme Court of New Jersey, developer of the *Henningsen* warranty concept, would also hold products liability applicable to non-dangerous products causing mere economic loss. See *Santor v. A & M Karagheusian, Inc.,* 44 N.J. 52, 207 A.2d 305 (1965). On the other hand, the Supreme Court of California, issuer of the *Greenman* tort-based concept of products liability, held the concept inapplicable in such cases. *Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal. Rptr. 16, 403 P.2d 145 (1965). As most courts throughout the country forthrightly adopted the tort-based approach to products liability, they also rejected the *Santor* precedent in favor of the more rational and policy-oriented approach of *Seely* in commercial settings. See *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.,* 626 F.2d 280, 287, n. 13 (3d Cir. 1980) (citing cases).

Even the New Jersey Supreme Court has recently come full circle and acknowledged the preeminence of sales law in "benefit of the bargain" and consequential loss disputes between commercial entities. In *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), the court held that where the action is between "commercial parties with comparable bargaining power", neither strict products liability nor negligence may be used as a basis for recovering "benefit of the bargain" or consequential loss damages. The disappointed commercial entity will be left to its remedies, if any, under the Uniform Commercial Code. *Id.*, at 575-576. Most significantly, the New Jersey court clarifies that "perfect parity is not necessary to a determination that the parties have substantially equal bargaining positions" and, further, that a commercial purchaser "may be better situated than the manufacturer to factor into its price the risk of economic loss caused by the purchase of a defective product." *Id.*, at 576. Thus, if commercial purchasers, such as the petitioners herein, miscalculate their risk when bargaining for their contract or err in risk allocation by not purchasing appropriate insurance, the consequences are not to be borne by the manufacturer under a false or fictitious tort theory.

A fair historical analysis emphasizes the impropriety of using tort products liability as a premise for recovery of consequential damages in the absence of an unreasonably dangerous defect resulting in personal injury or property damage. Viewed in proper historical context, therefore, the position advanced by petitioners is not evolutionary at all. Rather, it is a proposed regression from the well-recognized tort foundation of strict liability. Little purpose is served by confusing anew the extraordinary tort remedy with what is really a subject for contractual warranty. In the past 20 years, courts have finally succeeded in

eliminating the confusion caused by the artificial diversion of tort products liability into warranty. Petitioners' invitation to this Court to return modern law to its prior muddled state should be discerned and rejected.

B. The Policy Underpinnings Of Products Liability In Tort.

Apart from historical imperatives, policy considerations also compel rejection of the tort expansion sought in this case. Such public policy criteria have guided the courts throughout the legal evolution. Principal among these policy perceptions has been the overriding concern for the safety of consumers. Thus, in *Thomas v. Winchester, supra,* 6 N.Y. at 409, the court in 1852 wrote:

> " 'So highly does the law value human life, that it admits of no justification wherever life has been lost and the carelessness or negligence of one person has contributed to the death of another' [citations omitted]."

Similar concerns were voiced by the *MacPherson* court in 1916.

Later refinement of products liability in tort also resulted in a more particularized identification of policy rationales supporting the doctrine. *Greenman, supra,* for example, stated the purpose of strict tort liability as being:

> ". . . to ensure that the costs of injuries arising from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." 59 Cal.2d at 63.

In *Codling v. Paglia, supra,* 32 N.Y.2d 330, the New York Court of Appeals identified three of the most commonly-

repeated policy considerations: (a) the superior position of the manufacturer, as compared to a consumer, to detect and avoid safety-related defects, 32 N.Y.2d at 340; (b) the superior ability of the manufacturer, as compared to a consumer, to spread the loss resulting from injuries caused by such defects, *Id.,* at 341; and (c) the deterrent effect which imposition of products liability would have upon manufacturers, providing "considerable incentive, to turn out useful, attractive, but safe products." *Id.;* see also, Keeton, *Products Liability—The Nature and Extent of Strict Liability,* 1964 U. of Ill. L.F. 693, 695-696; Owen, *Rethinking the Policies of Strict Products Liability,* 33 Vand. L.Rev. 681 (1980). Each of these tort policies is decidedly uncompelling in a dispute between sophisticated commercial entities seeking "benefit of the bargain" and consequential loss recovery.

The policy notion that a manufacturer is in a "better position" to prevent "unreasonably dangerous" defects in products works well when the focus is upon safety-related defects, thereby responding to universal concerns of public health and safety. However, the "defect prevention" concept breaks down where the purported "defect" consists of a failure of the product to meet the supposed "expectations" of the commercial purchaser. Such an entity could have negotiated and spelled out those expectations in a contract allocating the consequences of disappointment. The California court, in *Seely,* expressed it well:

> "The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held liable for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will." 403 P.2d at 151.

The policy notion of the manufacturer as superior "risk distributor" is perhaps the most commonly cited rationale for the imposition of tort products liability. See *Jones & Laughlin Steel Co. v. Johns-Manville Sales Corp., supra,* 626 F.2d at 288. Indeed, petitioners in this action advance this rationale as a basis for extending tort liability. Thus, petitioners quote the reasoning from *Emerson G.M. Diesel v. Alaskan Enterprise,* 732 F.2d 1468, 1474 (9th Cir. 1984):

> "The manufacturer knows the purpose for which its product is to be used and by whom. Although all purchasers are not identical, the manufacturer can determine within a reasonable range of predictability the ramifications of a product failure for the ordinary user. Having this information, the manufacturer can include in its cost the expense of adequate insurance coverage." See Brief of Petitioners, p. 18.

Fair consideration of this kind of reasoning, however, demonstrates its manifest flaws and total impropriety.

First, the so-called "risk distribution" rationale has been debased as a material factor by legal writers. Dean Prosser, for example, terms it a "make weight" argument, even in the area of personal injuries. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L.Rev. 791, 799-800 (1966). Professor Owen calls for its total abandonment as a rationale for products liability decision-making. Owen, *Rethinking the Policies of Strict Products Liability, supra,* 33 Vand. L.Rev. at 707. The rationale need not be applied exclusively to products liability in tort; it could apply whenever anyone is injured by a superior risk-bearer. See *Wights v. Staff Jennings, Inc.*, 241 Or. 301, 405 P.2d 624, 627-629 (1965). Indeed, one logical consequence of the rationale would be imposition of a government-sponsored compensation scheme by all risk creators for all persons injured—perhaps a fitting concept for scholarly debate, but hardly an appropriate basis for judicial decisions in the sphere of established legal rights and responsibilities. Owen, *Rethinking the Policies of Strict Products Liability, supra,* 33 Vand. L.Rev. at 704-707.

Risk spreading rationales, in any event, are most compelling when safety, injury or accidents are involved. There, the courts have been impressed by the "overwhelming misfortune to the person injured" and the minimization of suffering and economic dislocation when such occasional losses occur. See Note, *Economic Loss in Products Liability Jurisprudence,* 66 Colum. L.Rev. 917, 952-953 (1966). The consuming public, it may be assumed, would be willing to accept the redistribution of losses through the mechanism of increased cost of the product as an appropriate price to pay for safety from a dangerous defect that threatens them as well as the person injured. The "make weight" rationale of risk spreading bogs down completely, however, when mere "benefit of the bargain"

and consequential losses are involved. There is neither logic nor policy supporting the imposition upon other purchasers of the product, who may well be willing to "trade off" qualitative inferiority for a lower price, to bear the onus of one customer's dissatisfaction with the quality and performance of the product. See *Jones & Laughlin Steel Corp., supra,* 626 F.2d at 288.

The risk spreading rationale for consequential loss and warranty disputes loses all force, moreover, when the mechanism considered for such risk distribution is insurance. The "manufacturer should go out and obtain insurance" rationale expressed in *Emerson G.M. Diesel, supra,* is factually insupportable. Even in the personal injury area, there are significant and ever-increasing problems with insurance availability and affordability. See *Interagency Task Force on Products Liability, Final Report,* pp. xxxv-xxxvii (Executive Summary 1977); Ericsson, *Insurance Furor,* 15 A.B.A. *The Brief,* 10-14 (Fall 1985); Teff, *Alarm From London,* 15 A.B.A. *The Brief,* 16-21 (Fall 1985). The magnitude of the crisis created by ever-expanding application of products liability in tort, through concepts such as "second collision," "enterprise liability" and failure to warn theories, coupled with increasingly high monetary awards for personal injuries, needs little discussion. Reed & Watkins, *Products Liability Tort Reform: The Case for Federal Action,* 63 Neb. L.Rev. 389, 422-449 (1984). This crisis exists despite the fact that current products liability policies expressly *exclude* coverage for damage to the product itself, business risks and consequential economic loss. See 1 CCH Products Liab. Rep., ¶¶3500, 3550, 3560 (1983); see also, Note, *Economic Loss in Products Liability Jurisprudence, supra,* 66 Colum. L.Rev. at 953-955; Speidel, *Products Liability, Economic Loss and the UCC, supra,* 40 Tenn. L.Rev. at 317 ("We all know that insurance companies do

not write policies against loss of this kind."). It is, therefore, difficult to discern what available insurance the *Emerson* panel was referring to. Certainly, in light of the perceived "crisis" in the insurance industry as a result of personal injury losses, it can hardly be expected that the insurance risk-spreading mechanism could be expanded to include unlimited consequential damages for the failure of a product to meet the unwarranted expectations of a sophisticated commercial consumer.

Moreover, petitioners' invocation of the risk-spreading rationale appears disingenuous. The suggestion in *Emerson* that the "manufacturer knows the purpose for which its product is to be used and by whom" is unpersuasive when it is considered that the commercial purchaser, who agreed to the contractual limitations of warranty, may well be in a far *better* position to know the purposes to which the product will be put.

Certainly, in the context of this case, it is the owners and charterers of the vessels who will know the destination and duration of the voyages, the value of the cargo, the consequences of "down time," if any, and the perils to be encountered. Obviously, the implications of a voyage to war-torn Iran for oil in a zone of war risk will differ from a short haul down the American coast. These knowledgeable entities can better obtain insurance peculiar to their needs and temporal considerations, as opposed to a hapless manufacturer who, many years after sale, might be sued in tort for unlimited damages in derogation of the limitations in a contract freely bargained.

If the risk-spreading rationale is to have legitimacy, it must place responsibility upon the party in the *superior*

position to spread the risk. As even the New Jersey Supreme Court recently recognized:

> "[A] commercial buyer . . . may be better situated than the manufacturer to factor into its price the risk of economic loss caused by the purchase of a defective product." *Spring Motors Distributors, Inc. v. Ford Motor Co., supra,* 98 N.J. at 576.

The manifest availability of a host of marine insurance policies to owners and charters, see J.A. 88-92; see generally, *Admiralty Law Institute, a Symposium on the Hull Policy,* 42 Tulane L.Rev. 231 (1967), including coverage for consequential losses, see Gilmore & Black, *The Law of Admiralty* (2d ed. 1984), §2-4, p. 58, when compared to the unavailability of products liability insurance to cover economic and consequential loss damage claims, inexorably suggests that petitioners are superior "risk spreaders." Thus, petitioners' "risk-spreading" argument actually militates against their position.

The other major tort policy rationale of "deterrence" also is uncompelling in this case. The "deterrence" sought by imposition of products liability is against the issuance of unsafe or "unreasonably dangerous" products that cause injury. Such purposes are fulfilled by the existing application of tort products liability to personal injury and property damage actions. To expand the rationale in order to "deter" *qualitatively-inferior* products, subjectively perceived as such by a commercial entity whose negotiations at arm's length proved to be miscalculated or inept, or which might have been specifically selected by a careful shopper in preference to a higher priced and higher quality product, neither comports with the basis for the rationale nor is it sound policy. See *Jones & Laughlin Steel Corp., supra.* In any event, such a "deterrence" policy is already

reflected in the Uniform Commercial Code, other statutory provisions and established contract law. Still further tort-based "deterrence" against unlimited consequential loss claims is simply unconvincing. Every conceivable dispute about the quality of goods, how they should work and when they should wear out should not become a new tort quagmire. Moreover, given the absence of a statute of limitations for tort in admiralty, "deterrence" against products that disappoint user expectations, in perpetuity, is simply unattainable.

Equally important is the fact that variations and asymmetry often exist in individual sales transactions "upstream" and "downstream" from the manufacturer. Contractual bargains up and down the line of production and distribution would necessarily be affected by application of a tort theory of liability for the failure of the product to live up to the expectations of the purchaser. Should all suppliers of raw materials, contractors, distributors, etc. obtain insurance against liability limitless in amount, scope and time? Balancing of the kind required in sales transactions is the function of the Uniform Commercial Code and the law of sales, which provide a flexible means by which to measure the proper expectations of all of the parties. See *Alfred N. Koplin & Co. v. Chrysler Corp.*, 49 Ill. App.3d 194, 7 Ill. Dec. 113, 364 N.E.2d 100, 107 (1977).

Still another rationale for imposition of products liability is the so-called "representational" theory. E.g., Shapo, *A Representational Theory of Consumer Protection, supra,* 60 Va. L.Rev. 1109; Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer),* 69 Yale L.J. 1099, 1123 (1960). However, like the "deterrence" and "risk spreading" policies, the rationale simply does not focus upon "benefit of the bargain" and consequential loss claims. While it may be appropriate to enforce an unlimited and non-waivable implied representation of "safety" running in favor of those accidentally injured by dangerous defects in a product, it is unreasonable to extend a fictional representation concerning the *quality* of the goods, when sophisticated entities have negotiated express conditions governing the point. See Wade, *Torts Liability for Products Causing Physical Injury, supra,* 48 Mo. L.Rev. at 9 (1983).

It is perhaps most fitting that, after a studious review of relevant precedents, scholarly authorities and policy implications, the New Jersey Supreme Court in 1985 recognized what was obvious to most courts years earlier:

> "Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement." *Spring Motor Distributors, Inc. v. Ford Motor Co., supra,* 98 N.J. at 579-80.

POINT II

THE BALANCE OF POLICY CONSIDERATIONS APPLICABLE TO THE CIRCUMSTANCES HEREIN DOES NOT SUPPORT A DIFFERENT RESULT IN A MARITIME CONTEXT.

Petitioners do not dispute that the *Seely* rationale has become the predominantly accepted approach to such warranty disputes. Their failure to do battle with the weight of court decisions and tort scholars seemingly reflects the policy void inherent in their position. Instead, petitioners seem to suggest that the courts of admiralty should "go their own way", and fashion an expansive tort remedy for every loss that has some relation to the sea. This contention finds no support in the policies underlying products liability, the law of sales, *or* the law of admiralty.

While it is true that admiralty law often champions persons injured at sea, this does not mean that sound legal principles adopted for the benefit of land-based citizens will automatically be rejected in the maritime context. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (looking, *inter alia,* to state statutes and common law in formulating admiralty principles). This is particularly true in the instant setting.

To the extent that "simplicity and practicality" exists in admiralty tort law, an assertion heavily relied upon by petitioners, it has primarily focused upon the protection of seamen who are placed in peril of personal injury, but are incapable of assuring their own protection. Examples are the traditional rule of "maintenance and cure" and the adoption of the warranty of seaworthiness. *The OSCEOLA,* 189 U.S. 158 (1903). *Scarff v. Metcalf,* 107

N.Y. 211, 13 N.E. 796 (1887), cited in *The OSCEOLA* (189 U.S. at 175), reflects these typical concerns:

> "The Maritime Law is sensitive to the rights of seamen and sedulous for their protection. When sick or injured they are entitled to be cared for and cured at the expense of the ship, and not to be turned adrift in strange lands without adequate provisions. They are exposed to hardship, confronted with dangers, and grow occasionally reckless by their very familiarity with peril. The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited. That which on land would be contributory negligence the Maritime Law scarcely recognizes and readily excuses (citations omitted), and in many ways throws its protection around the seaman. When he falls sick or suffers injury, the owners owe to him the duty of rendering such care and medical aid as circumstances permit, and in the performance of that duty, the master stands as the agent and representative of the owners and his negligence is theirs (citations omitted)." 107 N.Y. at 215-216.

Sensitivity to the plight of seamen has also found expression in, e.g., rejection of the arbitrary distinction between invitees and licensees, *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), a distinction similarly dispensed with by land-based courts, *e.g., Basso v. Miller,* 40 N.Y.2d 233, 386 N.Y.S.2d 564, 352 N.E.2d 868 (1976); rejection of contributory negligence as a complete bar to recovery, substituting comparative negligence in mitigation of damages, *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953), again, a result ultimately adopted by many land-based jurisdictions; and the expansion of tort doctrine to encompass wrongful death on the seas, *Moragne v. States Marine Lines, supra,* 398 U.S. 375, a result with comparable application in land-based

jurisdictions. The Jones Act, 45 U.S.C. §51, *et seq.*, and The Death on the High Seas Act, 46 U.S.C. §761, *et seq.*, are manifestations of Congressional concern in the same vein.

Sensitivity towards the plight of injured seamen may properly be compared to the development of strict liability in tort for all consumers injured as a result of safety-related defects inherent in a product. See *Sieracki v. Seas Shipping Co.*, 149 F.2d 98 (3d Cir. 1945), *aff'd on other grounds*, 328 U.S. 85 (1946) (adoption of products liability in tort in admiralty context premised upon rationale of *MacPherson v. Buick Motor Corp., supra*). The same policy dynamics operating with respect to products liability on land, and the same limitations of tort doctrine, also militate against the expansion of maritime tort into commercial disputes between sophisticated bargainers governed by the law of sales.

With respect to business enterprises, and the allocation of commercial losses, an important policy of admiralty is to foster trade and to provide an orderly and predictable set of rules by which commercial disputes in maritime contexts can be resolved. See *Maru Shipping Co. v. Burmeister & Wain American Corp.*, 528 F.Supp. 210 (S.D.N.Y. 1982); see generally, Gilmore & Black, *The Law of Admiralty, supra*, Ch. XI. These objectives mesh perfectly with those underlying the Uniform Commercial Code and the law merchant. Commercial order and the sanctity of contracts are goals no less viable or desirable when the buyer's disappointed expectation occurs at sea.

Petitioners urge that application of the traditional rules of sales law would somehow "divest" them of their perceived "right" to consequential loss damages. This argument presupposes (a) that consequential damages are

uniformly afforded in maritime contexts wherever a tort is alleged; and (b) that the claim asserted by petitioners does, indeed, bespeak a tort commensurate with admiralty law. Since neither premise is correct, the argument must fail.

First, it is simply untrue that consequential damages will always be afforded where a tort has been committed in a maritime context. "Demurrage" was originally conceived, not as an element of tort liability, but as a "measure of damages" for the commission of an intentional tort through seizure of a ship. *The APOLLON*, 22 U.S. (9 Wheat.) 362, 378 (1824); see *The CONQUEROR*, 166 U.S. 110, 125 (1897). Where the alleged tort is *unintentional*, and results merely in economic losses without physical injury or damage to property, the courts have rejected claims for "down time" and other consequential losses premised upon tort concepts. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); *Getty Refining & Marketing Co. v. MT FADI B*, 766 F.2d 829 (3d Cir. 1985); *Barber Lines A/S v. M/V DONAU MARU*, 764 F.2d 50 (1st Cir. 1985); *State of Louisiana, ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985), *pet. for cert. pdg.*, and cases cited therein. While these opinions are not directly applicable to the circumstances here, they certainly dispel the conclusory suggestion that recovery of consequential losses is an automatic result of any recognized tort committed in a maritime context.

In any event, petitioners' argument really begs the essential question. This was correctly identified by the Court below: under the circumstances herein, should a tort theory be recognized or should a commercial dispute about the quality of the product, as negotiated and bargained for by sophisticated parties, more appropriately be treated as a contractual claim governed by the law of sales? The suggestion that tort doctrine should prevail is

unsupported by any compelling policy rationale either in petitioners' brief or the cases upon which they rely (*e.g., Emerson G.M. Diesel v. Alaskan Enterprise, supra; Ingram River Equipment, Inc. v. Pott Industries, Inc.*, 756 F.2d 649 [8th Cir. 1985], *pet. for cert. pdg.*). No valid reason is advanced for distinguishing between the result reached by a vast majority of common-law courts and the comparable result which should be reached under these circumstances in a maritime setting.

While petitioners seem to applaud the adoption of products liability in tort by admiralty courts, borrowed from its land-based origin, *Sieracki v. Seas Shipping Co., supra,* 149 F.2d 98; see *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977) (effectively adopting §402A of the Restatement [Second] of Torts), they would then have this Court disregard the very policy imperatives which caused the tort products liability concept to be adopted in the first place.

The very same analysis of policy underpinnings identified in Point I, *supra,* is fully applicable to the commercial losses suffered by petitioners here, albeit in a maritime context. Witness, for example, the direct analogy to land-based court reasoning applied in *Anglo Eastern Bulk Ships Ltd. v. Ameron, Inc.*, 556 F.Supp. 1198, 1204 (S.D.N.Y. 1982) to similar circumstances:

> "None of the policies behind *Restatement* §402A is served in the circumstances of this case. The parties here are large corporations of comparable bargaining power and commercial sophistication; and the terms of the sale of the [product] were negotiated at arm's length. Thus, the principal basis for strict liability—the need to protect innocent consumers not in privity of contract with the seller—is absent in this case [citations omitted]. The cost-internalization basis for strict liability is likewise irrelevant

> here: the parties did in fact bargain, in a commercial context, over the terms of sale, and the buyer and seller, both large business enterprises, were in relatively equal positions, compared to the typical manufacturer and consumer, to pass on and distribute accident costs. Finally, . . . plaintiffs were in at least as good a position as defendant 'to make the cost-benefit analysis between accident costs and accident avoidance costs and to pass on that decision once it is made' [citations omitted]."

Even in terms of risk distribution capabilities, the manufacturer here was in no superior position to allocate the risk of such consequential losses than were the petitioners. Indeed, if insurance is considered as the prime mechanism for distribution of the risk, owners and charterers of a vessel are undoubtedly in a better position than a product manufacturer both to recognize the extent of the potential loss and obtain the necessary insurance to cover consequential losses and other "intangible values." Gilmore & Black, *The Law of Admiralty, supra,* pp. 58-59. In terms of "deterrence" policy, the existing deterrence against safety-related injury-causing defects is already as great on sea as it is on land. Expansion of a "representational theory" of tort liability is no more justified in the context of this dispute between contracting commercial entities than it would be if the "down time" sought were due to frustration of expectations in a land-based factory. See, *Southwest Forest Industries, Inc. v. Westinghouse Electric Corp.*, 422 F.2d 1013, 1020 (9th Cir. 1970), *cert. denied,* 400 U.S. 902 (1970). Of course, the overriding concern—"the public interest in human life, health and safety" (Prosser, *The Assault upon the Citadel, supra*)—which provides the true foundation for tort doctrine, is already embodied in established admiralty law sensitive to the plight of seamen.

The vacuum of reasoning by petitioners underscores the impropriety of extending products liability in tort to the recovery of damages sought here. Simple invocation of the word "admiralty" or "maritime" is not a basis upon which to fashion a new "tort" fraught with grave consequences to all.

CONCLUSION

For the foregoing reasons, PLAC and MVMA submit that the determination of the court below should be affirmed.

Dated: New York, New York
December 17, 1985

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 84-1726

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EAST RIVER STEAMSHIP CORP., KINGSWAY TANKERS, INC., QUEENSWAY TANKERS, INC. and RICHMOND TANKERS, INC.,
Petitioners,

vs.

TRANSAMERICA DELAVAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AN AMICUS CURIAE AND BRIEF OF AMICUS CURIAE INGRAM RIVER EQUIPMENT, INC. IN SUPPORT OF PETITIONER RICHMOND TANKERS, INC.

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QUESTION PRESENTED

Does a Court have jurisdiction in admiralty of a tort action against a negligent shipbuilder to recover damages for economic loss?

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AN AMICUS CURIAE

Ingram River Equipment, Inc. ("Ingram") asks leave to file a brief as an Amicus Curiae in this case, the parties having refused to consent. Ingram's interest stems from the fact that:

1. A judgment in its favor has been brought to this Court for review by Pott Industries, Inc., ("Pott"). The Petition for a Writ of Certiorari is pending, and the ruling may be influenced by the decision in this case. *Pott Industries, Inc. v. Ingram River Equipment, Inc.,* No. 85-12 (filed July, 1985).

2. In the Ingram-Pott case, the Eighth Circuit held that Pott was negligent in the design and choice of materials used in four tank barges built for Ingram to transport heavy grades of

petroleum products, and in failing to test the purging capacity of the heating system.

3. Pott has filed a motion for leave to file a brief as amicus curiae and submitted a brief in support of Respondent in this case.

The issues in this case and in the Ingram-Pott case are different:

1. The decision in Ingram-Pott was based solely on negligence. Strict liability was not involved.

2. Four of the five counts in this case are based upon strict liability. Only one count, affecting one of the petitioners, Richmond Tankers, Inc., sounds in negligence.

Ingram is concerned that, because the doctrine of strict liability is the dominant theme in this case, the cause of action based on negligence may be obscured, along with many decisions of this Court which:

1. follow the basic tort principle that a wrongdoer should bear the cost of damage caused by his negligence; and

2. refuse to apply state law to defeat or narrow or impair the uniformity of substantive maritime rights of recovery; and

3. recognize the fact that shipping is a commercial enterprise and economic losses are as damaging as property damage, personal injury or any other kind of casualty expense.

Considerations of public policy, which might suggest limiting the exposure of a manufacturer made liable without fault under the doctrine of strict liability are not applicable to cases where negligence has been proved. Strict liability is of relatively recent vintage and provides an additional remedy. It does not supersede or displace the traditional admiralty right to recover for negligence.

Ingram believes that its brief in support of the count for negligence of Petitioner Richmond Tankers, Inc. will help to clarify the nature and scope of the issues involved in this case. Accordingly, Ingram requests leave to file the attached brief as Amicus Curiae.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE INGRAM RIVER EQUIPMENT, INC.

Ingram River Equipment, Inc. ("Ingram") supports the position of petitioner Richmond Tankers, Inc. in its cause of action for negligence (the fifth count) and urges the Court to reverse the decision below of the United States Court of Appeals for the Third Circuit on this point. The parties refused to consent to the filing of this brief.

INTEREST OF THE AMICUS CURIAE

Ingram has a direct interest in this case. The petition of Pott Industries, Inc. ("Pott") for a writ of certiorari to review a judgment that Ingram recover its economic loss caused by

Pott's negligence is now pending in this Court and may be influenced by the decision in this case. *Pott Industries, Inc. v. Ingram River Equipment, Inc.*, No. 85-12 (filed July, 1985).

A. The Ingram-Pott Case

The Eighth Circuit held Pott was negligent in the design and choice of materials used in the construction of four tank barges built for Ingram to transport heavy grades of petroleum products and in failing to test the purging capacity of the heating system. *Ingram River Equipment, Inc. v. Pott Industries, Inc.*, 756 F.2d 649 (8th Cir. 1985).

B. Focus of This Brief

Ingram is concerned that, in the *East River Steamship* case, because the doctrine of strict liability is involved in four of the five counts for all but one of the Petitioners, the negligence claim may be obscured. Ingram has sought leave to file this brief as Amicus Curiae simply to discuss, and hopefully to illumine, the negligence cause of action. This brief is limited to that aspect of the case.

In Ingram versus Pott, negligence was the sole basis of liability. The Eighth Circuit:

1. found it unnecessary to consider strict liability or alternative grounds of liability.

2. noted that the traditional rationale for denying recovery of economic losses against manufacturers in cases of strict liability was that they were made liable without fault or privity; and that unfairness might result unless this broad exposure was limited; but that

3. this did not apply to bar recovery in admiralty in tort for negligence. As the Court said:

> If a manufacturer is negligent, that is, if its product was not put together with the ordinary care that a reasonably prudent manufacturer should have used, it should pay for the resulting loss. The contrary rule, that the loss should be borne by the innocent purchaser, is unjust, in our opinion. We therefore hold that the economic-loss doctrine does not bar recovery of economic losses in a negligence action under maritime law. (756 F.2d 653).

It is possible that the Court's opinion in the *East River Steamship Corp.* case will influence the disposition of the pending motion for a writ of certiorari in the Ingram-Pott case. Ingram seeks leave to file this brief in an attempt to make clear that the considerations involved on the issue of strict liability are different from, and should not affect, the traditional rules relating to recovery in admiralty for economic losses caused by negligence.

SUMMARY OF ARGUMENT

For about a century, this Court has upheld jurisdiction in admiralty of tort claims to recover damages for economic losses. The law is clear that maritime rights will not be limited by the application of state common law rulings.

The doctrine of strict liability expanded the liability of a manufacturer or builder to include liability without fault and without privity. However, it is an additional remedy to the traditional tort action in admiralty for negligence. Neither the history nor the rationale of the doctrine of strict liability indicates that it was intended to displace or restrict the right to recover in admiralty for negligence; and the cases so hold.

ARGUMENT

1. For More Than A Hundred Years, Rulings Of This Court Have Sustained Admiralty Jurisdiction Of Tort Actions To Recover Damages For Economic Losses Resulting From Negligence.

For more than a hundred years, the rulings of this Court have sustained jurisdiction in admiralty for the recovery of economic losses. *The Potomac,* 105 U.S. 630, 26 L.Ed. 1194 (1882); *The Conqueror,* 166 U.S. 110, 17 S.Ct. 510 (1897). Shipping has a dominant commercial flavor; and economic losses are not demoted to junior status. They are no less threatening to vessel operation than other types of damage or injury. Indeed, this is the basis of the doctrine of maritime liens, enabling the owner to keep his vessel moving, using it as security to finance the cost of repairs and supplies.

Accordingly, the decisions hold that jurisdiction exists in admiralty for causes of action against manufacturers or builders, where the only damage sustained by the purchaser was to the property purchased. *Jig the Third Corporation v. Puritan Marine Insurance Underwriters Corporation,* 519 F2d 171 (5th Cir. 1975), *cert. denied,* 424 U.S. 954 (1976); *Miller Industries v. Caterpillar Tractor Co.,* 733 F.2d 813 (11th Cir. 1984); *Houston-New Orleans, Inc. v. Page Engineering Company,* 353 F.Supp. 890 (E.D. La. 1972); *Berg v. General Motors Corporation,* 87 Wash. 2d 584, 555 P.2d 818 (1976).

In *Jig the Third,* the Court rejected the argument that, since the only damage suffered was to the vessel itself, the owner could not maintain an action in maritime tort. The Court quoted with approval Dean Prosser's comment:

> There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries but also property damage to the defective chattel itself. W. Prosser, The Law of Torts, Section 101 at 665-6 (4th Edition 1971). 519 F.2d 175.

2. State Law Will Not Be Applied To Narrow Or Destroy Substantive Maritime Rights.

The argument that admiralty law should embrace state common law doctrines comes late in the day. Decisions of this Court have established the rule that state law will not be applied in admiralty to defeat or narrow substantive maritime rights of recovery. Thus, the Court has refused to impose the common law rules relating to contributory negligence (*Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953); or releases to maritime claims (*Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 243-246 (1942); or state statutes of frauds to maritime contracts (*Kossick v. United Fruit Co.,* 365 U.S. 731 (1961).

Once admiralty jurisdiction has been established, the substantive rules and precepts of admiralty become applicable, in the interest of uniformity.

3. Strict Liability Is A Separate Remedy. It Does Not Preclude Liability Based Upon Negligence.

Negligence and strict liability stand in marked contrast with respect to both the rationale and basis for imposing liability. Rules taken from the doctrine of strict liability should not be engrafted onto the doctrine of negligence, where they are inapposite.

The responsibility of the manufacturer or builder of a product has been expanded under the doctrine of strict liability in two major areas: there is liability (1) without fault to users or consumers and (2) with no requirement of privity. Strict liability applies - although "(a) the Seller has exercised all possible care in the preparation and sale of his product and (b) the user or consumer has not bought the product from or entered into any contractural relation with the seller." (Restatement (Second) of Torts, Section 402(A)(2)(a) and (b)).

The Restatement (Second) of Torts indicates that these changes "represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract." (Ibid, Comment b),

> The justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products. (Ibid, Comment c).

Courts have, of course, noted the difference between strict liability and negligence. In *Lindsay v. McDonnell Douglas Aircraft Corporation,* 460 F.2d 631, 637 (8th Cir. 1972), the Eighth Circuit said:

> Negligence requires a different standard and quantum of proof than does strict liability in tort.

In *Emerson G.M. Diesel, Inc. v. Alaskan Enterprises,* 732 F.2d 1468, 1473 (9th Cir. 1984), the Ninth Circuit observed that, under a negligence theory, plaintiff must show defendant's "failure to adhere to an accepted standard of conduct." Under strict liability, plaintiff "must show that the product was defective and that the product was used in a reasonably foreseeable way."

In the cases imposing strict liability, questions were raised as to whether it was fair to hold a seller liable without fault and without privity, if the product was not unreasonably dangerous and as to the expense of insurance if the risks covered included economic or qualitative losses. However, as the Restatement makes clear, these concerns did not apply to cases involving negligence.

> The rule stated here is not exclusive and does not preclude liabilities based upon the alternative ground of negligence of the seller, where such negligence can be proved. (Restatement (Second) of Torts, Section 402A, Comment a).

If the builder was negligent, it is not unfair to require that he pay for the resulting damage. Moreover, proof of fault would require evidence showing the existence of an obligation or duty of care. The expense of insuring such a risk, limited in this manner, should properly be regarded as part of the cost of doing business. At least in the case of a reasonably prudent manufacturer or builder, the expense would be manageable.

As the Eighth Circuit stated in *Ingram River Equipment, Inc. v. Pott Industries, Inc., supra,* the negligent manufacturer, rather than the innocent purchaser should pay for the damage caused by its fault. Moreover, the law is clear "that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries but also property damage to the defective chattel itself" (Prosser, Law of Torts (Fourth Edition, 1971), Section 101, p. 665).

To label damage as "only economic loss" does not make the expense of repair and replacement less burdensome to the innocent purchaser. There is no justification for restricting the right of one damaged by negligence to recover in admiralty.

Moreover, the argument that recovery should not be permitted in the case of damage negligently caused which results in economic loss only - but may be proper if property damage

results - is specious. Why maritime tort action is not appropriate in the first instance is not made clear.

The decisions upholding jurisdiction in admiralty for the recovery of damages caused by negligence of a shipbuilder represent traditional admiralty remedies. Shipping is a dominantly commercial operation. Avoidance of economic damage and loss is a major concern. Strict liability is a doctrine recently incorporated into admiralty law. However, it has been included, where applicable, as an additional remedy. Neither history nor reason suggest that it has displaced or curtailed the tort remedy for negligence in admiralty.

CONCLUSION

Jurisdiction in admiralty to grant recovery for economic losses resulting from negligence is of long standing. It accords with the reality that shipping is a commercial operation in which economic losses are as burdensome as property damage resulting from a casualty. Strict liability is a remedy of more recent vintage. There is no reason why it should be regarded as superseding or replacing the tort remedy in admiralty for negligence.

The decision of the Third Circuit against Petitioner Richmond Tankers, Inc. on the cause of action for negligence should be reversed.

Respectfully submitted,

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